

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

PREPARED FOOD PHOTOS, INC.,)	Volume 2
)	
Plaintiff,)	Case No. 22-CV-642
)	
v.)	Milwaukee, WI
)	
SHARIF JABER and NOFAL, LLC doing)	October 29, 2024
business as FOOD TOWN MART,)	8:59 a.m.
)	
Defendants.)	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE J. P. STADTMUELLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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For the Defendants:
(Present)

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ALSO PRESENT:

MS. REBECCA JONES,
Intellectual Property Director,
Prepared Food Photos, Inc.

U.S. Official Court Reporter: JENNIFER L. STAKE, RDR, CRR
Proceedings recorded by computerized stenography, transcript
produced by computer-aided transcription.

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I N D E X

WITNESSES

None

EXHIBITS

None

JURY INSTRUCTIONS:
by the Court
by the Court

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CLOSING ARGUMENTS:
by Mr. DeSouza
by Mr. Steinle
by Mr. DeSouza

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VERDICT RECEIVED:
by the Court

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TRANSCRIPT OF PROCEEDINGS

08:59

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THE CLERK: The Court calls Prepared Food Photos, Incorporated, versus Sharif Jaber and Nofal, LLC doing business as Food Town Mart for a jury -- Case No. 22-CV-642 for a jury trial. May I have the appearances beginning with the plaintiff.

09:00

MR. DeSOUZA: Good morning, your Honor. This is Daniel DeSouza for the plaintiff.

09:00

MR. STEINLE: Good morning, your Honor. I'm Timothy Steinle. I appear for the defendant Sharif Jaber and Nofal, LLC. Mr. Jaber is physically present in court, sir.

09:00

THE COURT: Thank you. Good morning to counsel, and good morning to your respective clients. I neglected to mention their presence this morning was not necessary. So if either wish to leave, they don't have to be here.

09:00

Our purpose this morning is to address the jury instructions. As the Court noted yesterday, we provided counsel with draft instructions and verdict form Thursday last week. And our purpose this morning is to address your concerns, the Court's concerns. And generally the way the Court proceeds in such matters is we'll go through the instructions Part I and Part II, then Part III, along with the verdict form.

09:01

So I'm not sure if counsel have any specific requests this morning; or if you do, you want to take them up as we go

1 through the three parts, we can do it that way, too.

09:01 2 MR. DeSOUZA: Your Honor, myself and Mr. Steinle
3 yesterday after court discussed the jury instructions, and
4 there were only a handful of items that we had --

09:01 5 THE COURT: Sure.

09:02 6 MR. DeSOUZA: -- discussed and had some suggestions to
7 the Court on, I think, by agreement. I don't know if Mr.
8 Steinle has come up with additional ones since then, but I can
9 run those through you just quickly to point them out to you.
10 There's only four or five of them.

09:02 11 THE COURT: Sure. That's fine. Do any of them apply
12 to Part I?

09:02 13 MR. DeSOUZA: These are on the jury instructions, your
14 Honor, it's on Page 9. I'm just looking at the PDF, but it's
15 Page 9 of 24 --

09:02 16 THE COURT: All right.

09:02 17 MR. DeSOUZA: -- the section that the Court had
18 highlighted in yellow.

09:02 19 THE COURT: Yes.

09:02 20 MR. DeSOUZA: There's a sentence there that says,
21 Sharif Jaber testified in his capacity as the registered agent
22 for Nofal, LLC. I think Mr. Steinle and I thought that was
23 more accurate if it was either "member" or "manager."

09:02 24 I don't know, Tim, if you had -- what your suggestion was,
25 but "registered agent" seemed incorrect. I think he is the

1 registered agent, but he's not here testifying as the
2 registered agent itself.

09:03 3 MR. STEINLE: It just is a matter of technicality.
4 It's an LLC. There are members of an LLC. He's the sole
5 member, so I think the appropriate legal term would be he
6 testified as the sole member of the LLC. And it's more
7 technical, but that's -- that's what it is, sir.

09:03 8 THE COURT: All right. We can accommodate that.

09:03 9 MR. DeSOUZA: On Page 10 of the PDF, your Honor, there
10 was a couple items you have highlighted in yellow that I just
11 think based on the evidence, they go away, the video.

09:03 12 THE COURT: Yes.

09:03 13 MR. DeSOUZA: Yeah, things by video or certain
14 summaries are in evidence. I think those go away.

09:03 15 THE COURT: Yes.

09:03 16 MR. DeSOUZA: On Page 14, there's another item
17 highlighted in yellow, it's the James Bond expression of ideas.
18 I don't think that's applicable here. I don't think we need
19 that --

09:04 20 THE COURT: Sure.

09:04 21 MR. DeSOUZA: -- in the instruction.

09:04 22 THE COURT: No problem.

09:04 23 MR. DeSOUZA: And, Tim, I don't know if I missed
24 anything. That's what I had written down as to what we
25 discussed.

09:04 1 MR. STEINLE: Well, there -- as we go through the
2 instructions, depending upon how the Court rules on certain
3 things such as fair use and those types of things.

09:04 4 THE COURT: Sure.

09:04 5 MR. STEINLE: And the willfulness and those types of
6 things, whether that goes to the jury or not. But at least in
7 terms of the instructions themselves, sir, I'm stating the
8 obvious, but if willfulness disappears, the -- anything having
9 to do with willfulness disappears.

09:04 10 THE COURT: You and the judge both missed one in Part
11 III. The introductory phrase said, "The case will be submitted
12 in the form of ten questions." There are not ten questions.

09:05 13 MR. STEINLE: We missed that, your Honor. I --

09:05 14 THE COURT: Well, even the judge missed it, so we all
15 make mistakes in life. So --

09:05 16 MR. DeSOUZA: What page is that on, your Honor?

09:05 17 MR. STEINLE: Page 20.

09:05 18 THE COURT: It is --

09:05 19 MR. STEINLE: Page 20 of 24, the first sentence.

09:05 20 THE COURT: Yes, first sentence. Members of the jury.

09:05 21 MR. DeSOUZA: Well, the Court -- the Court could still
22 be correct if we come up with another seven questions...

09:05 23 THE COURT: Well, why don't we go back and go through
24 the instructions beginning in Part I. After hearing your
25 comments this morning, I don't have any comments or suggested

1 changes in Part I beyond those that both of you mentioned.

09:06 2 MR. DeSOUZA: I agree, your Honor. We -- I -- from
3 the plaintiff's perspective, we don't have any other comments
4 to that section.

09:06 5 MR. STEINLE: Yes, Judge. Other than what we just
6 stated, obviously --

09:06 7 THE COURT: Sure.

09:06 8 MR. STEINLE: -- but there's no other corrections or
9 modifications that I would suggest or recommend.

09:06 10 THE COURT: All right. Moving to Part II, there are
11 two issues that are presented on Page 12. The question of
12 willful, and the question of fair use are both addressed.
13 First, the plaintiff alleges that Nofal doing business as Food
14 Town Mart willfully infringed. And if that's the plaintiff's
15 contention as it remains, it's certainly entitled to that
16 position. Willful will remain.

09:07 17 When it comes to fair use, there are concerns that the
18 Court has, and my preference would be to simply inform the jury
19 that the matter of fair use is not a matter that is before them
20 and has been reserved by the Court for determination.

09:08 21 After 37 and a half years, what the Court's real concern
22 here is if we instruct the jury that a particular claim has
23 been dismissed, as opposed to simply telling them that it is a
24 matter that has been reserved for determination by the Court,
25 they more often than not take from a dismissal of certain

1 parties or certain claims that somehow the Court is
2 telegraphing to them that there is merit to the other claims
3 and suggesting that they should find in favor of a particular
4 party or a particular claim.

09:09 5 And that's what, through experience, I have endeavored to
6 avoid sending that kind of message, as opposed to simply
7 telling the jury that it is a matter for the Court to
8 determine, without telegraphing what the Court's decision is or
9 was.

09:09 10 So our purpose this morning is to hear both sides out on
11 this. I wasn't aware until I saw the response to an
12 interrogatory question that the fair use claim had been
13 withdrawn, at least in terms of the pleadings.

09:09 14 MR. STEINLE: Well, if I may?

09:10 15 THE COURT: Certainly.

09:10 16 MR. STEINLE: If -- first of all, if I'm to understand
17 what the Court just stated, what the Court stated in substance
18 is fair use is not necessarily off the table. And -- and what
19 the Court indicated -- and I believe that to be consistent with
20 the case law. In other words, I think there's no bright line
21 test for fair use. And it is a mixed question of fact and law.
22 And the testimony's now come in so facts may or may not support
23 the defense of fair use. And getting back to where I was, if
24 the Court's just indicated that that issue will be one that the
25 Court may address, if appropriate, at the conclusion of the

1 jury trial and would essentially take the fair use defense off
2 the table for the jury's determination to try to move quickly
3 through this, I don't necessarily have any significant concerns
4 with the jury not deciding that issue, if the Court is
5 indicating that the Court is going -- will -- if necessary,
6 will address that issue in the future.

09:11 7 THE COURT: Sure.

09:11 8 Mr. DeSouza?

09:11 9 MR. DeSOUZA: Your Honor, I think fair use is -- as
10 Mr. Steinle said, it's a mixed question of fact or law. But at
11 the conclusion of the evidence yesterday, we made the 50(a)
12 motion. I think my position is if the Court grants that
13 motion, I obviously have no issue telling the jury you've
14 reserved on that issue so it doesn't taint them as to believing
15 one way or the other. But if the Court is not inclined to
16 grant that motion, I think it is proper to submit the question
17 to the jury at that point. It is a jury question. The parties
18 have determined this is a jury trial.

09:12 19 But I go back to what your Honor just said earlier, which
20 is there's no trial by surprise in federal court, your Honor.
21 We have interrogatory responses that were never amended in this
22 case. No one ever went back and amended. We went into trial
23 with interrogatory responses, "We've withdrawn our fair use
24 defense." And now Mr. Steinle comes to trial yesterday and
25 from his client saying this is not by Facebook page to now say

1 it is our Facebook page and, oh, by the way, fair use is back
2 on the table, I think the Court either determines the 50(a)
3 motion or it gets submitted to the jury because, if anything,
4 my client is looking for some finality at the end of the jury
5 trial, not let's go brief fair use and subsequent motions, and
6 let's have the Court come back and decide the issue.

09:12 7 We're all here. The jury is here. I think the Court either
8 grants the 50(a) motion fair use is gone, or it gets submitted
9 to the jury and we have an answer today as to -- well,
10 presumably if the jury finishes their deliberations today, we
11 have a final answer at that point would be my preference, your
12 Honor.

09:13 13 THE COURT: All right. Mr. Steinle?

09:13 14 MR. STEINLE: Your Honor, it's crystal clear that the
15 Court can conform the special verdict to the evidence at trial.
16 And throughout the course of pleadings and then throughout the
17 course of discovery and throughout the testimony elicited at
18 trial, things occur. And what the Court should do, I believe,
19 is to conform the ultimate special verdict to that evidence.

09:13 20 And whether or not this Court believes at least factually
21 that the evidence that was elicited at this trial warrants the
22 submission of a fair use affirmative defense, Mr. DeSouza
23 certainly can argue. If it's going to be on the special
24 verdict and if that's what the Court ultimately decides, then
25 he can argue that that was a response. However, as I

1 indicated, evidence changes throughout the course of discovery.
2 Things change throughout the course of discovery.

09:14

3 And so my position is, as I stated, if the Court is of the
4 mindset that fair use will be determined by this Court and not
5 the jury, I'm okay with that. However, if the Court is of a
6 mindset that fair use is at least a question for the -- to be
7 submitted to the jury, regardless of an answer to an
8 interrogatory during the course of discovery, then -- then fair
9 use, in my opinion, should be on the special verdict. And he
10 can argue whatever he chooses to argue at that time.

09:15

11 MR. DeSOUZA: And, your Honor, if I may, I just want
12 to be clear, the 50(a) motion yesterday was not simply you
13 withdrew your fair use defense. There's no basis for this
14 defense. The evidence is in. Your Honor is certainly allowed
15 under Rule 50 to grant judgment as a matter of law on a defense
16 that just cannot survive.

09:15

17 In the history of fair use -- and this is before and after
18 the Supreme Court came down in *Warhol* and give us our guidance
19 on fair use -- there has never been a fair use case where
20 someone says come buy pork chops for 2.29 a pound. There's
21 nothing transformative. There's nothing educational. There's
22 nothing scholastic about it. It's use of a photo in a
23 commercial advertising for sale of a product. The question
24 does not need to be submitted to the jury.

09:16

25 Whether they withdrew the defense or not, it is clear as

1 day that none of the factors for fair use are met here, and so
2 it's why we asked yesterday grant the 50(a) motion. It
3 shouldn't be submitted to the jury, and that's just in addition
4 to the fact that they withdrew the defense in the first place.
5 Certainly we can raise that in closing if it gets that far, but
6 I don't believe there's any basis to submit this question to
7 the jury, your Honor.

09:16 8 THE COURT: All right.

09:16 9 MR. STEINLE: Without -- with the Court's permission,
10 I apologize.

09:16 11 THE COURT: No, no.

09:16 12 MR. STEINLE: With the Court's permission, the -- the
13 examples that are given in Section 107 under the authority
14 indicates that those are examples of activities that may
15 qualify for fair use. It's not an exclusive list. And what
16 the -- what the statute says in substance is there's four
17 things to take into consideration when you're determining
18 whether fair use is applicable. And the cases are pretty
19 crystal clear that whether or not it's a nonprofit or whether
20 it's a commercial, fair use is used in commercial cases, it's
21 used in nonprofit cases. And what the Court's saying is -- and
22 that's what I started by -- there's no bright line test.
23 There's no bright line test.

09:17 24 So the mere fact that he asked questions, is this a
25 reporting, is this teaching, is this scholarship, is it

1 research, that doesn't end there. It doesn't end there because
2 those are only examples of fair use. So that -- my argument is
3 I think it's still on the table. That's my opinion.

09:17 4 THE COURT: All right. Well, in the interest of
5 avoiding error, the better exercise of the Court's discretion
6 in such matters is we're going to leave it in, and the Court
7 obviously can address it later in motions after verdict if
8 there be a factual basis to revisit the subject.

09:18 9 So the entirety of the balance of Part II, unless there be
10 specific changes, will go forward as the draft suggests. That
11 leaves only the matter of questions that may pertain to
12 damages. And the Court has a question mark with respect to the
13 second full paragraph from the bottom on Page 17 with respect
14 to the matter of lost profits.

09:19 15 MR. DeSOUZA: Your Honor, the plaintiff is not seeking
16 disgorgement of profits in this case, so actual damages would
17 be limited to the other categories of actual damages as
18 described in the instruction. So I think the parenthetical,
19 the plus any profits --

09:19 20 THE COURT: All right.

09:19 21 MR. DeSOUZA: -- can come out.

09:19 22 THE COURT: Okay.

09:19 23 MR. DeSOUZA: The same way that on Page 18 what's in
24 the parenthetical there can also come out.

09:19 25 THE COURT: All right. So that brings us to Part III

1 and the jury verdict form. We're still with five questions
2 rather than ten.

09:20 3 MR. STEINLE: May I ask, please, of the Court, actual
4 damages and statutory damages under the unambiguous language of
5 the statute, it's alternative. You either get actual or you
6 get statutory.

09:20 7 THE COURT: Well, then ultimately it's the plaintiff's
8 determination once they see the verdict.

09:20 9 MR. STEINLE: So that's --

09:20 10 THE COURT: But the jury still determines both
11 amounts, and then it becomes a question for plaintiff to elect.

09:20 12 MR. STEINLE: And the only reason that I hesitate is I
13 have a problem with -- it's not a problem -- I have a question
14 as to whether the jury -- or whether the plaintiff gets to
15 argue both. In other words, my expression is he gets two kicks
16 at the cat, so to speak. He gets to argue to the jury for
17 actual damages and gets to argue to the jury for statutory
18 damages. And then when the statute says -- doesn't he have to
19 elect before closing as to which item of damages he's claiming?

09:21 20 THE COURT: I don't believe the answer to that
21 question is yes. I think it's no, he doesn't have to.

09:21 22 MR. DeSOUZA: Your Honor, if I may, it's directly in
23 504(c)(1). It says, "At any time before final judgment is
24 rendered," not before the jury comes back. There's a Seventh
25 Circuit case, copyright case, the jury awarded both statutory

1 damages and actual damages. The plaintiff elected. Seventh
2 Circuit says that's perfectly appropriate per the plain
3 language of the statute.

09:22 4 THE COURT: Sure. No, unless you've got some more
5 recent authority, Mr. Steinle, it's a matter for plaintiff to
6 elect. You have -- if you want to use the two kicks at the cat
7 analogy, you can argue both. You're not limited to arguing one
8 or the other. You can argue that he's not entitled to damages
9 under either theory.

09:22 10 MR. STEINLE: I understand the ruling of the Court. I
11 understand it.

09:22 12 THE COURT: All right. Anything further, Mr. DeSouza,
13 on instructions?

09:22 14 MR. DeSOUZA: Your Honor, I don't think I have a basis
15 to change the vicarious infringement instructions because they
16 are standard, but I'll make a record that there is language in
17 the standard instructions that says a defendant -- or for
18 vicarious purposes, a defendant must profit from the
19 infringement, whereas I believe that law in the Seventh Circuit
20 rather than using the word "profit" uses the defendant has a
21 "financial interest" in the infringing activities. But I
22 understand the Seventh Circuit has given us our standard
23 instructions and they have "profit," but I would ask your Honor
24 to change the word "profit" to the word "financial interest."
25 Understanding what your Honor's ruling is likely to be, I'm

1 just making my proffer on that point, your Honor.

09:23 2 THE COURT: Mr. Steinle, do you have any thought?

09:23 3 MR. STEINLE: Well, my thought is the standard
4 instruction says the word "profit." I don't see -- those are
5 the standard instructions, and I don't see any reason to change
6 it, and I would object to changing it.

09:24 7 THE COURT: All right. We will abide by the standard
8 instruction. And for purposes of any appeal, Mr. DeSouza has
9 made his record.

09:24 10 MR. DeSOUZA: Thank you, your Honor.

09:24 11 Other than that, I have no further suggestions or problems
12 with the instructions, your Honor.

09:24 13 MR. STEINLE: Nor do I.

09:24 14 THE COURT: Thank you. Now, how long do both of you
15 anticipate your arguments going? I told the jury yesterday
16 it's going to take pretty close to an hour for the Court to
17 read everything, so -- and I would hope since jurors generally
18 appreciate the fact that they have the benefit of the
19 instructions before counsel argue because it allows you to key
20 off from instructions, address the evidence in light of
21 instructions, et cetera, so they don't really appreciate having
22 counsel simply go through the rote exercise of rereading the
23 very instructions that they heard from the Court.

09:25 24 They have them in a binder, so if you wanted to reference
25 them, you're certainly free to do so. There aren't too many

1 courts that do it the way we do. But they have the
2 instructions here in the courtroom to follow as I read them.
3 They can take them into the jury room and use them as a frame
4 of reference during their deliberations.

09:26 5 MR. DeSOUZA: Your Honor, I've yet to meet the lawyer
6 that doesn't like the sound of his own voice, and so I don't
7 want to underestimate the amount of time that closing takes.
8 But having done a few of these cases in similar form, I think
9 it's probably about a half an hour for closing --

09:26 10 THE COURT: Sure, that's fine.

09:26 11 MR. DeSOUZA: -- for either side, I think.

09:26 12 THE COURT: Sure.

09:26 13 MR. STEINLE: And consistent with my opening, I would
14 anticipate that -- a similar amount of time. We have a three
15 -- three or four question special verdict. It's not overly
16 complex, your Honor.

09:26 17 THE COURT: Sure. Well, we will get these
18 instructions formatted. They should be available this morning
19 sometime between 10:30 and 11:00, if you'd like copies before
20 1:00 this afternoon.

09:26 21 MR. STEINLE: May I please ask a question?

09:26 22 THE COURT: Certainly.

09:27 23 MR. STEINLE: Have we discussed the special verdict
24 and specifically Question No. 6 as it relates to the
25 willfulness? I -- it is -- Question No. 6, willfulness, I made

1 a motion to dismiss that any -- that claim. And I am inquiring
2 of the Court whether the question of willfulness will be
3 submitted to the jury.

09:27 4 THE COURT: It will be, and your motion was taken
5 under advisement. So the motion is still live, just like Mr.
6 DeSouza's motion to dismiss the fair use claim is still alive.

09:27 7 MR. STEINLE: Very well. I understand.

09:27 8 MR. DeSOUZA: Your Honor, just to clarify, are we able
9 to get electronic copies of the jury instructions and verdict
10 forms so that if need be we can --

09:28 11 THE COURT: Sure.

09:28 12 MR. DeSOUZA: -- put them on the screen?

09:28 13 THE COURT: We'll make that happen. If you give or
14 provide Ms. Willenbrink an address where you'd like them
15 e-mailed to, we can do that.

09:28 16 MR. DeSOUZA: Thank you, your Honor.

09:28 17 THE COURT: So we'll see you shortly before 1:00, and
18 the jury will be here, and we'll be ready to proceed. Thank
19 you for your contributions, and we'll stand in recess until
20 1:00.

09:28 21 COURT SECURITY OFFICER: All rise.

09:28 22 (A recess was taken.)

13:00 23 COURT SECURITY OFFICER: All rise.

13:00 24 (The jury entered the courtroom.)

13:00 25 (The court is called to order.)

13:00 1 THE COURT: Good afternoon, members of the jury, and
2 good afternoon to counsel, and good afternoon to their clients.

13:00 3 Members of the jury, the Court and counsel have completed
4 their work on the jury instructions. They've been printed and
5 formatted, and Ms. Vraa is going to make copies of the
6 instructions and the binder available to you now, after which
7 the Court will proceed with reading those instructions.

13:01 8 COURT SECURITY OFFICER: Oh, I'm sorry. Here, I've
9 got it. Thank you.

13:01 10 THE COURT: These instructions are formatted in a
11 three ring binder in three separate parts.

13:01 12 Part I, General Introduction. Members of the jury: Now
13 that you have heard all the evidence in the case, it becomes my
14 duty to instruct you on the law which applies to this case.

13:01 15 These instructions will be in three parts:

13:01 16 First: The instructions on general rules which define and
17 control the jury's duties in a civil case;

13:02 18 Second: The instructions stating the rules of law which
19 you must apply, that is, what each party must prove in their
20 case; and

13:02 21 Third: Some rules and guidelines for your deliberations
22 and return of your verdict.

13:02 23 At the conclusion of my instructions the lawyers for the
24 parties will deliver their closing arguments followed by the
25 concluding instructions of the Court.

13:02 1 Copies of these instructions will be available in the jury
2 room for each of you to consult should you find it necessary.

13:02 3 It is your duty to find the facts from all the evidence in
4 the case. To those facts you must apply the law as I give it
5 to you in these instructions, whether you agree with the law or
6 not. All of the instructions are equally important and should
7 be considered together as a connected series and regarded as
8 the law applicable to the case. As jurors, you have no right
9 to disregard, or give special attention to, any one of the
10 instructions, or to question the wisdom of any rule of law.

13:03 11 As jurors, you should consider and view the evidence in
12 light of your own observations and experiences in the affairs
13 of life.

13:03 14 In determining the facts, you should do so from a fair
15 consideration of the evidence. That means you must not be
16 influenced by prejudice, fear, favor, public opinion, personal
17 likes or dislikes, opinions, or sympathy.

13:04 18 This case should be considered and decided by you as an
19 action between persons of equal standing in the community, of
20 equal worth, and holding the same or similar stations in life.

13:04 21 All parties are equal before the law. Each of the parties
22 in this case is entitled to the same fair consideration. In
23 this case, the plaintiff, Prepared Food Photos, Inc. and one of
24 the defendants, Nofal, LLC doing business as Food Town Mart,
25 are corporations; the other defendant, Sharif Jaber, is an

1 individual. Corporations are entitled to the same fair
2 consideration that you would give any individual person.

13:05 3 In reaching your verdict, you may consider only the
4 testimony of the witnesses and the exhibits received in
5 evidence. Certain things are not evidence, and you may not
6 consider them in determining what the facts are.

13:05 7 Those matters and things which are not evidence include the
8 following:

13:05 9 First, opening statements and closing arguments by the
10 lawyers for the parties are not evidence. What they have said
11 in their opening statements served to acquaint you with the
12 facts they expected the evidence to show. What they say in
13 their closing arguments is intended to help you interpret the
14 evidence. You should consider the closing arguments carefully;
15 however, if the evidence as you recall it differs from the way
16 Prepared Food Photos, Inc.'s or Sharif Jaber or Nofal, LLC
17 doing business as Food Town Mart's lawyers have characterized
18 it, keep in mind it is your recollection of the evidence that
19 controls during your deliberations.

13:06 20 Second, questions and objections by the lawyers for the
21 parties are not evidence. Prepared Food Photos, Inc.'s or
22 Sharif Jaber or Nofal, LLC doing business as Food Town Mart's
23 lawyers have a duty to object to what they feel are improper
24 questions asked of the witnesses. You should not draw any
25 conclusions for either side from the fact that an objection was

1 made to any question and that the witness may not have been
2 permitted to answer it. If I sustained objections to questions
3 that were asked, you must not speculate on what the answers
4 might have been.

13:07 5 Third, testimony or exhibits which have been excluded or
6 stricken, or that you have been instructed to disregard, are
7 not evidence and must not be considered. In addition, if
8 testimony or exhibits have been received for a limited purpose,
9 you must follow the limiting instruction given as to such
10 matters.

13:07 11 Fourth, anything you may have heard or seen about this case
12 outside the courtroom must be entirely disregarded by you. You
13 are to decide this case solely on the basis of the evidence
14 received during the trial.

13:08 15 If during the course of this trial you have gained any
16 impression that I have a feeling one way or another about this
17 case, then you should completely disregard any such impression
18 because you, as jurors, are the sole judges of the evidence and
19 the credibility of the witnesses in this case. My feelings are
20 wholly immaterial. Neither by these instructions, nor by any
21 ruling or remark which I have made, do I mean to indicate any
22 opinion as to the facts or as to what your verdict should be.
23 Moreover, I have a duty to caution or warn a party or an
24 attorney who does something that I believe is not in keeping
25 with the rules of evidence or procedure. You are not to draw

1 any inference against the side whom I may caution or warn
2 during the trial. You are the sole and exclusive judges of the
3 facts.

13:09

4 In determining the facts, you are reminded that before each
5 member of the jury was accepted and sworn to act as a juror,
6 you were asked questions regarding your competency,
7 qualifications, fairness, and freedom from prejudice or
8 sympathy. On the faith of those answers, each of you was
9 accepted by the parties to serve as a juror. Therefore, those
10 answers are as binding on each of you now as they were then,
11 and should remain so until the jury is discharged from
12 consideration of this case.

13:10

13:10

13 In this civil action, certain questions in the special
14 verdict form ask that you answer the questions "yes" or "no."
15 The party who wants you to answer the questions "yes" has the
16 burden of proof as to those questions. The burden of proof is
17 to satisfy you by the greater weight of the credible evidence,
18 to a reasonable certainty, that "yes" should be your answer to
19 the questions.

13:10

20 When I say a particular party must prove something by "the
21 greater weight of the credible evidence," or when I use the
22 expression "if you find," or "if you decide," this is what I
23 mean: The evidence in favor of a "yes" answer has more
24 convincing power than the evidence opposed to it. "Credible
25 evidence" means evidence you believe in light of reason and

1 common sense. "Reasonable certainty" means that you are
2 persuaded based upon a rational consideration of the evidence.
3 This rule does not, of course, require proof to an absolute
4 certainty, since proof to an absolute certainty is seldom, if
5 ever, possible in any case. However, a guess is not enough to
6 meet the burden of proof.

13:11 7 Those jurors who may have sat in a criminal case have heard
8 of proof beyond a reasonable doubt. As I stated in my
9 preliminary instructions, that standard does not apply in a
10 civil case such as this one and, therefore, you should put it
11 out of your mind.

13:12 12 The evidence from which you are to determine the facts in
13 order to reach a verdict consists of:

13:12 14 First: The sworn testimony of witnesses, both on direct
15 and cross-examination, regardless of who called the witness;

13:12 16 Second: Deposition testimony presented during the trial;

13:12 17 Third: Exhibits which have been received into evidence,
18 regardless of who may have produced them; and

13:12 19 Fourth: Any facts to which the parties' lawyers have
20 agreed or stipulated or which I have directed you to find. A
21 stipulation is an agreement between both sides that certain
22 facts are true.

13:13 23 During the course of the trial, I occasionally may have
24 asked questions of a witness, in order to bring out facts not
25 then fully covered in the testimony. Please do not assume that

1 I hold any opinion on the matters to which my questions may
2 have related. Remember that you, as jurors, are at liberty to
3 disregard all comments of the Court in arriving at your own
4 findings on the facts.

13:13

5 There are two kinds of evidence: Direct and
6 circumstantial. Direct evidence is direct proof of a fact such
7 as the testimony of a person who claims to have personal
8 knowledge, such as an eyewitness. Circumstantial evidence, on
9 the other hand, is proof of a chain of facts and circumstances
10 from which you could find that another fact exists even though
11 it has not been proved directly.

13:14

12 The law makes no distinction between the weight to be given
13 either direct or circumstantial evidence. Therefore, all of
14 the evidence in the case, including circumstantial evidence,
15 should be considered by you in arriving at your verdict. It is
16 for you to decide whether a fact has been proved by
17 circumstantial evidence. In making that decision, you must
18 consider all the evidence in the light of reason, common sense,
19 and experience.

13:14

20 You are to consider only the evidence in the case. But in
21 your consideration of the evidence you are not limited to the
22 bald statements of the witnesses. In other words, you are not
23 limited to what you see and hear as the witnesses testify. You
24 are permitted to draw, from facts which you find have been
25 proved, such reasonable inferences as seem justified in the

1 light of your experience.

13:15 2 Inferences are deductions or conclusions which reason and
3 common sense lead the jury to draw from facts which have been
4 established by the evidence in the case. You are allowed to
5 make reasonable inferences, so long as they are based on the
6 evidence.

13:15 7 In determining whether any fact has been proved, you should
8 consider all of the evidence bearing on the question,
9 regardless of who introduced it.

13:16 10 If you have taken notes during the trial, you may use them
11 during your deliberations to help you remember what happened
12 during the trial. You should use your notes only as aids to
13 your memory. The notes are not evidence. All of you should
14 rely on your independent recollection of the evidence, and you
15 should not be unduly influenced by the notes of other jurors.
16 Notes are not entitled to any more weight than the memory or
17 impressions of each juror.

13:16 18 You, as jurors, are the sole judges of the credibility of
19 the witnesses and the weight their testimony deserves. You may
20 be guided by the appearance and conduct of each witness, or by
21 the manner in which each witness testified, or by the character
22 of the testimony given, or by evidence to the contrary of the
23 testimony given. However, you should not be influenced by any
24 person's race, color, religion, national ancestry, or sex.

13:17 25 You should carefully scrutinize all the testimony given,

1 the circumstances under which each witness has testified, and
2 every matter in evidence which tends to show whether a witness
3 is worthy of belief. Consider each witness' age, intelligence,
4 motive, state of mind, and demeanor or manner while on the
5 stand. Consider each witness' ability to observe the matters
6 as to which he or she has testified, and whether he or she
7 impresses you as having an accurate recollection of these
8 matters. Consider also any relation each witness may bear to
9 either side of the case, including any interest, bias,
10 prejudice held by the witness; the manner in which each witness
11 may be affected by your verdict; and the extent to which, if at
12 all, each witness is either supported or contradicted by other
13 evidence in the case.

13:18 14 Inconsistencies or discrepancies in the testimony of a
15 witness or between the testimony of different witnesses, may or
16 may not cause the jury to discredit such testimony. Two or
17 more persons witnessing an incident or a transaction may see or
18 hear it differently; innocent mis-recollection, like failure of
19 recollection, is a common experience. In weighing the effect
20 of a discrepancy, always consider whether it pertains to a
21 matter of importance or an unimportant detail, and whether the
22 discrepancy results from innocent error or intentional
23 falsehood.

13:19 24 A witness may be discredited or impeached by contradictory
25 evidence, or by evidence that at some other time the witness

1 has said or done something, or has failed to say or do
2 something, which is inconsistent with the witness' present
3 testimony. If you believe any witness has been impeached and
4 thus discredited, it is your exclusive province to give the
5 testimony of that witness such credibility, if any, as you may
6 think it deserves.

13:20 7 After making your own judgment, you will give the testimony
8 of each witness such weight, if any, as you may think it
9 deserves.

13:20 10 You may, in short, accept or reject the testimony of any
11 witness in whole or in part.

13:20 12 You may consider statements given by a party before trial
13 as evidence of the truth of what he or she said in the earlier
14 statements, as well as in deciding what weight to give any
15 witness' testimony.

13:21 16 With respect to other witnesses, the law is different.
17 During the trial, attorneys for the parties questioned certain
13:21 18 witnesses regarding prior statements or acts that those
19 witnesses may have made. You may consider those prior
20 inconsistent statements in reaching your verdict, but your
21 consideration of those statements must differ based upon the
22 situation in which they were offered. If the prior statement
23 was given by a witness under oath before trial, then you may
24 consider that prior statement for two purposes: first, as
25 evidence of the truth of what was said in the prior statement;

1 and, second, as part of your decision on what weight to give
2 the witness' testimony.

13:22

3 On the other hand, if the witness did not make the prior
4 statement under oath or acted in a manner that is inconsistent
5 with the witness' testimony here in court, then you may
6 consider that evidence only for the purpose of deciding whether
7 the witness' testimony in court was true and what weight it
8 should receive. Whenever considering a witness' prior
9 statement or conduct, you should again consider whether it was
10 simply an innocent error or an intentional falsehood and
11 whether it concerns an important fact or an unimportant detail.

13:23

12 If you find that a witness' testimony conflicts with facts
13 established by other evidence and that the testimony cannot be
14 reconciled with those facts, then disregard the conflicting
15 testimony. But the testimony of the witness is overcome by
16 other evidence only if that evidence establishes a conclusion
17 contradicting such testimony beyond any reasonable ground for
18 doubt.

13:23

19 Prepared Food Photos designated Rebecca Jones as its
20 corporate representative. You should consider Rebecca Jones'
21 testimony as complete, knowledgeable, and binding on Prepared
22 Food Photos, Inc. Similarly, Sharif Jaber testified in his
23 capacity as the sole member of Nofal, LLC doing business as
24 Food Town Mart. You should consider Sharif Jaber's testimony
25 as complete, knowledgeable, and binding on Nofal, LLC doing

1 business as Food Town Mart.

13:24

2 If you, during your deliberations, wish to have another
3 opportunity to view an exhibit that was presented as evidence,
4 you should send a note written to me through the bailiff,
5 signed by your foreperson or by one or more members of the
6 jury, and I will allow you to return to the courtroom for
7 another opportunity to view that exhibit. You are not required
8 to view any exhibits a second time. You may rely, instead, on
9 your recollections of these exhibits as you observed them at
10 trial.

13:25

11 A demonstration of how a witness downloaded Prepared Food
12 Photos, Inc. photograph from the internet has been shown to
13 you. This demonstration was used for convenience and to help
14 explain the facts of the case. It is not in itself evidence or
15 proof of any facts.

13:25

16 You are not bound to decide any issue of fact in accordance
17 with the testimony of any number of witnesses which does not
18 produce in your mind's belief in the likelihood of truth, as
19 against the testimony of a lesser number of witnesses or other
20 evidence which does produce such belief in your minds.

13:26

21 The test is not which side brings in the greater number of
22 witnesses, or presents the greater quantity of evidence, but
23 which witness, and which evidence, appeals to your minds as
24 being most accurate and otherwise trustworthy.

13:26

25 You are instructed that it is entirely proper for an

1 attorney to interview any witness in preparation for trial.

13:26 2 The law does not require any party to call as witnesses all
3 persons who may have been present at any time or place involved
4 in the case, or who may appear to have some knowledge of the
5 matters at issue in this trial. Nor does the law require any
6 party to produce as exhibits all papers and things mentioned in
7 the evidence in the case.

13:27 8 Part II, The law applicable to Prepared Food Photos' claims
9 and Sharif Jaber's and Nofal, LLC doing business as Food Town
10 Mart's defense.

13:27 11 The Court will now summarize the issues that you must
12 decide and for which I will provide instructions to guide your
13 deliberations.

13:27 14 The plaintiff, Prepared Food Photos, Inc., has alleged that
15 Nofal, LLC doing business as Food Town Mart willfully infringed
16 its copyright in a photograph of pork chops. It also alleges
17 that Sharif Jaber vicariously infringed its copyright in the
18 same photo by failing to stop Nofal, LLC doing business as Food
19 Town Mart, from engaging in the alleged infringing activity.

13:28 20 You must decide the following four main issues:

13:28 21 One: Whether the defendant Nofal, LLC doing business as
22 Food Town Mart copied protected expression in the plaintiff
23 Prepared Food Photo, Inc.'s copyrighted work thereby infringing
24 the plaintiff's copyright;

13:29 25 Two: Whether the defendant Sharif Jaber is vicariously

1 liable for the infringing acts, if any, of Nofal, LLC doing
2 business as Food Town Mart;

13:29 3 Three: Whether the defendants' alleged copying of Prepared
4 Food Photos' protected expression was fair use; and

13:29 5 Fourth: If the defendants are liable for copyright
6 infringement, what damages Prepared Foods, Inc. is entitled to.

13:29 7 The Court will now instruct you on the law applicable to
8 Prepared Food Photos claims and Sharif Jaber and Nofal, LLC
9 doing business as Food Town Mart's defense. You must give
10 separate consideration to each of the parties' claims and
11 defenses in this case.

13:30 12 1. Direct Copyright Infringement.

13:30 13 Prepared Food Photos, Inc. claims that Nofal, LLC doing
14 business as Food Town Mart infringed its copyrighted material,
15 namely, a photo of pork chops, by displaying the photograph on
16 a Facebook page possibly in connection with Nofal, LLC's
17 business activities.

13:30 18 To succeed on this claim, Prepared Foods, Inc. must prove
19 by a preponderance of the evidence each of the three following
20 elements:

13:31 21 One: The photograph is the subject of a valid copyright;

13:31 22 Second: Prepared Food Photos, Inc. owns the copyright in
23 the photograph; and

13:31 24 Three: Nofal, LLC doing business as Food Town Mart copied
25 protected expression in Prepared Food Photos, Inc. copyrighted

1 work.

13:31

2 The parties have stipulated that the photograph is the
3 subject of a valid copyright and that Prepared Food Photos,
4 Inc. owns the copyright in the photograph. You are therefore
5 only required to decide the third element: Whether Nofal, LLC
6 doing business as Food Town Mart copied protected expression in
7 Prepared Food Photos, Inc. copyrighted work. I will explain
8 what the terms "copy" and "protected expression" mean.

13:32

9 You may infer that Nofal, LLC doing business as Food Town
10 Mart copied Prepared Food Photos, Inc. work if the similarities
11 between the two works can be explained only by copying, rather
12 than by coincidence, independent creation, or the existence of
13 a common source for both works.

13:32

14 "Protected expression" means expression in the plaintiff's
15 work that was created independently, involving some creativity.
16 Copyright law protects only original expression in the work.
17 This includes the way the facts or ideas are expressed in the
18 work but does not include the facts or ideas themselves.

13:33

19 Your determination as to the element of copying protected
20 expression in copyrighted material, and therefore as to
21 Prepared Food Photos, Inc. claim of copyrighted infringement
22 against Nofal, LLC doing business as Food Town Mart, should be
23 indicated in response to Question No. 1 on the special verdict
24 form.

13:34

25 If you find that Prepared Food Photos, Inc. has proved by a

1 preponderance of the evidence that Nofal, LLC doing business as
2 Food Town Mart copied protected expression in Prepared Food
3 Photos, Inc. copyrighted work, you must go on to consider
4 Nofal, LLC doing business as Food Town Mart's fair use defense.

13:34 5 On the other hand, if you find that Prepared Food Photos,
6 Inc. has not proved by a preponderance of the evidence that
7 Nofal, LLC doing business as Food Town Mart copied protected
8 expression in Prepared Food Photos, Inc. copyrighted work, then
9 you must find that Nofal did not infringe Prepared Food Photos,
10 Inc. copyrighted material, and you will not consider any other
11 question as to Nofal, LLC doing business as Food Town Mart's
12 fair use defense, Sharif Jaber's vicarious liability, or
13 damages.

13:35 14 2. Fair Use.

13:35 15 Nofal, LLC doing business as Food Town Mart contends that,
16 even if it copied protected expression in Prepared Food Photos,
17 Inc. copyrighted work of pork chops, its copying is allowed
18 under what the law calls "fair use."

13:36 19 To succeed on this defense, Nofal, LLC doing business as
20 Food Town Mart must prove, by a preponderance of the evidence,
21 that it made fair use of Prepared Food Photos, Inc.'s work for
22 the purpose or purposes of criticism, parody, comment, news
23 reporting, teaching, scholarship, or research.

13:36 24 In deciding this, you should consider the following:

13:36 25 The purpose and character of Nofal, LLC doing business as

1 Food Town Mart's use, including whether Nofal, LLC doing
2 business as Food Town Mart's use is of a commercial nature or
3 whether the use is for nonprofit educational purposes;

13:37 4 The degree of creativity in Prepared Food Photos, Inc.'s
5 work;

13:37 6 Whether Prepared Food Photos, Inc.'s work was published or
7 unpublished;

13:37 8 The amount of Prepared Food Photos that Nofal, LLC doing
9 business as Food Town Mart copied, and the significance of the
10 portion copied in relation to Prepared Food Photos work as a
11 whole; and

13:37 12 How Nofal, LLC doing business as Food Town Mart's use
13 affected the potential market for Prepared Food Photos, Inc.
14 work.

13:37 15 It is up to you to decide how much weight to give each
16 factor.

13:38 17 Your determination as to whether Nofal, LLC doing business
18 as Food Town Mart made fair use of Prepared Food Photos, Inc.
19 work should be indicated in response to Question No. 2 in the
20 special verdict form.

13:38 21 If you find that Nofal, LLC doing business as Food Town
22 Mart has not proved by a preponderance of the evidence that it
23 made fair use of Prepared Food Photos, Inc.'s work, then you
24 should go on to consider whether Sharif Jaber was vicariously
25 liable for Nofal, LLC doing business as Food Town Mart's

1 infringement of Prepared Food Photos, Inc. and damages.

13:39 2 On the other hand, if you find that Nofal, LLC doing
3 business as Food Town Mart has proved by a preponderance of the
4 evidence that it made fair use of Prepared Food Photos, Inc.'s
5 work, then you need not consider any other question as to
6 Sharif Jaber's vicarious liability or damages.

13:39 7 3. Vicarious Copyright Infringement.

13:39 8 Prepared Food Photos claims that Sharif Jaber is liable for
9 Nofal, LLC doing business as Food Town Mart's infringement of
10 Prepared Food Photos, Inc.'s copyright in the subject photo.
11 To succeed on this claim, Prepared Food Photos, Inc., must
12 prove, by a preponderance of the evidence, the following
13 elements:

13:40 14 One: Nofal, LLC doing business as Food Town Mart infringed
15 Prepared Food Photos' copyright, as defined in the instructions
16 I have already given you;

13:40 17 Second: Sharif Jaber profited from the infringement by
18 Nofal, LLC doing business as Food Town Mart; and

13:40 19 Three: Sharif Jaber had the right and ability to stop or
20 limit the infringement by Nofal, LLC doing business as Food
21 Town Mart but failed to do so.

13:40 22 Your determination as to whether Sharif Jaber is
23 vicariously liable for Nofal, LLC doing business as Food Town
24 Mart's copyright infringement should be indicated in response
25 to Question No. 3 on the special verdict form.

13:41 1 If you find that Sharif Jaber is vicariously liable for
2 Nofal, LLC doing business as Food Town Mart's copyright
3 infringement, then you must go on to determine the appropriate
4 amount of damages. If you find that Nofal, LLC doing business
5 as Food Town Mart is liable for copyright infringement but that
6 Sharif Jaber is not vicariously liable for Nofal, LLC doing
7 business as Food Town Mart's copyright infringement, then you
8 must still go on to determine an appropriate amount of damages.

13:42 9 4. Damages.

13:42 10 If you find that Prepared Food Photos, Inc. has proved that
11 Nofal, LLC doing business as Food Town Mart has infringed
12 Prepared Food Photos, Inc. copyright and/or that Sharif Jaber
13 has vicariously infringed Prepared Food Photos, Inc. copyright,
14 then you must determine the amount of damages, if any, that
15 Prepared Food Photos is entitled to recover. If you find that
16 Prepared Food Photos has failed to prove infringement, or that
17 Nofal, LLC doing business as Food Town Mart made fair use of
18 Prepared Food Photos, Inc.'s work, then you will not consider
19 the question of damages.

13:43 20 Your determination as to what damages Prepared Food Photos,
21 Inc. is entitled to recover should be indicated in response to
22 Question Nos. 4, 5, and 6 on the special verdict form.

13:43 23 Prepared Food Photos must prove damages by a preponderance
24 of the evidence. Prepared Food Photos may recover for any
25 actual losses it suffered because of the infringement.

1 Alternatively, Prepared Food Photos, Inc. may recover an amount
2 called "statutory damages." I will define each of these terms.

13:43 3 4.1 Actual Damages.

13:44 4 Actual losses from copyright infringement might include,
5 for example:

13:44 6 A decrease in the market value of Prepared Food Photos
7 Inc.'s copyrighted work caused by the infringement;

13:44 8 Profits that Prepared Food Photos, Inc. proves that it
9 would have made without the infringement. Profits are the
10 revenue that Prepared Food Photos would have made on sales he
11 would have made without the infringement, less any additional
12 expenses he would have incurred in making the sales;

13:44 13 What a willing buyer would reasonably have paid Prepared
14 Food Photos, Inc. to obtain a license to display its
15 copyrighted work.

13:45 16 4.2 Statutory Damages.

13:45 17 Alternatively, you may award as statutory damages an amount
18 that you find fair under the circumstances. The amount must be
19 between \$750 and \$30,000 as further described below, may be
20 adjusted depending on whether the infringement was intentional.
21 In determining the appropriate amount to award, you may
22 consider the following factors:

13:45 23 The expenses that Nofal, LLC doing business as Food Town
24 Mart saved and the profits it's earned because of the
25 infringement;

13:46 1 The revenues that Prepared Food Photos, Inc. lost because
2 of the infringement;

13:46 3 The difficulty in proving Prepared Food Photos, Inc. actual
4 damages;

13:46 5 The circumstances of the infringement;

13:46 6 Whether Nofal, LLC doing business as Food Town Mart
7 intentionally infringed Prepared Food Photos' copyright; and

13:46 8 Deterrence of future infringement.

13:46 9 With respect to the factor of intentional infringement: If
10 Prepared Food Photos, Inc. proves that Nofal, LLC doing
11 business as Food Town Mart willfully infringed Prepared Food
12 Photos, Inc. copyright, then you may, but are not required to,
13 increase the statutory damages to award a sum as high as
14 \$150,000. Infringement is considered willful if Prepared Food
15 Photos proves that Nofal, LLC doing business as Food Town Mart
16 knew that its actions constituted infringement of Prepared Food
17 Photos, Inc.'s copyright or acted with reckless disregard of
18 Prepared Food Photos, Inc.'s copyright.

13:47 19 On the other hand, if Nofal, LLC doing business as Food
20 Town Mart proves that it innocently infringed Prepared Food
21 Photos, Inc.'s copyright, then you may, but are not required
22 to, reduce the statutory damage award to a sum as low as \$200.
23 Infringement is considered innocent if Nofal, LLC doing
24 business as Food Town Mart proves that it did not know, or had
25 no reason to know, that its acts constituted infringement.

13:48 1 Part III, Deliberations.

13:48 2 Members of the jury: This case will be submitted to you in
3 the form of a special verdict consisting of six questions. A
4 form for the special verdict has been prepared for your
5 convenience, and you will find that special verdict form
6 following Part III of the Court's instructions.

13:49 7 It reads: United States District Court, Eastern District
8 of Wisconsin, Prepared Food Photos, Inc., plaintiff, versus
9 Sharif Jaber and Nofal, LLC doing business as Food Town Mart,
10 defendants, Case No. 22-CV-642-JPS. Special verdict.

13:49 11 We, the jury, duly impaneled and sworn for our special
12 verdict in the above-entitled action find as follows:

13:49 13 Direct copyright infringement against Nofal, LLC doing
14 business as Food Town Mart. You must answer this question.
15 Question No. 1: (See Part II, Section 1 of the jury
16 instructions.) Did Nofal, LLC doing business as Food Town Mart
17 infringe upon the copyrighted material of Prepared Food Photos,
18 Inc.? Answer, to the right of which appears a blank line with
19 the words "yes" or "no" beneath it.

13:50 20 Based upon the jury's unanimous determination, your
21 foreperson will insert either the word "yes" or the word "no"
22 as your answer.

13:50 23 If you answered "yes" to Question No. 1, then you must
24 answer Question No. 2. If you answered "no" to Question No. 1,
25 then you do not answer any other questions on this form;

1 instead, proceed and sign this form.

13:51

2 Fair use, Question No. 2: (See Part II, Section 2 of the
3 jury instructions.) Did Nofal, LLC doing business as Food Town
4 Mart make fair use of Prepared Food Photos, Inc. work? Again,
5 the word "answer" appears to the right of appears -- or beneath
6 appears the words "yes" or "no" under a blank line. Again, if
7 the jury is required to answer this question, based upon the
8 jury's unanimous determination, your foreperson will insert
9 either the word "yes" or the word "no."

13:52

10 If you answered "no" to Question No. 2, then you must
11 answer Question No. 3. If you answered "yes" to Question No.
12 2, then do not answer any other questions on this form;
13 instead, proceed to sign and date this form, even if you
14 answered "yes" to Question No. 1.

13:52

15 Vicarious copyright infringement against Sharif Jaber.
16 Question No. 3: (See Part II, Section 3 of the jury
17 instructions.) Did Sharif Jaber vicariously infringe upon the
18 copyrighted material of Prepared Food Photos? Beneath which
19 again the word "answer" appears to the right of which appears a
20 blank line with the words "yes" or "no" beneath it. Again, if
21 the jury's required to answer this question, your foreperson,
22 based upon the jury's unanimous determination, will insert
23 either the word "yes" or the word "no."

13:53

24 If you answered "yes" to Question No. 3, then you must
25 answer Question No. 4. If you answered "yes" to Question No.

1 1, but "no" to Question No. 3, then you should still proceed to
2 answer Question No. 4.

13:53 3 Damages. If you answered "yes" to Question No. 1 or "yes"
4 to Question Nos. 1 and 3 and answered "no" to Question No. 2,
5 then and only then answer each of the Questions 4, 5, and 6.

13:54 6 Question No. 4: (See Part II, Section 4.1 of the jury
7 instructions.) What amount of money fairly and reasonably
8 compensates Prepared Food Photos, Inc. for its actual damages?
9 Beneath which appears a dollar sign and a blank line to the
10 right. And once again, if the jury's required to answer this
11 question, your foreperson will insert the dollar amount the
12 jury has unanimously agreed upon.

13:55 13 Question No. 5: (See Part II, Section 4.2 of the jury
14 instructions.) What amount of money fairly and reasonably
15 compensates Prepared Food Photos, Inc. for its statutory
16 damages? Again, beneath the question appears a dollar sign
17 with a blank line to the right. And, again, if the jury's
18 required to answer Questions 4, 5, and 6, based on the jury's
19 unanimous determination, your foreperson will insert the dollar
20 amount that the jury has unanimously agreed upon.

13:55 21 Question No. 6: (See Part II, Section 4.2 of the jury
22 instructions.) Was Nofal, LLC doing business as Food Town
23 Mart's infringement of Prepared Food Photos copyrighted
24 material willful? Again, if the jury's required to answer
25 Questions 4, 5, and 6, you will see the word "Answer" beneath

1 the question. And based on the jury's unanimous determination,
2 your foreperson will insert either the word "yes" or the word
3 "no."

13:56 4 Dated at Milwaukee, Wisconsin, this blank day of October,
5 2024. Once the verdict is completed with the insertion of each
6 of the answers that the jury is required to make in order to
7 arrive at a completed verdict, the foreperson will affix his
8 signature on the line provided and on the line below print his
9 name.

13:57 10 Returning to the instructions, you will note that certain
11 questions in the special verdict form are to be answered only
12 if you have answered a previous question in a particular
13 manner. Therefore, it is important that you read each question
14 very carefully before you answer it. Do not needlessly answer
15 questions.

13:57 16 The amount to be inserted by you in your answers to the
17 damages questions is for you to determine from the evidence in
18 the case. What the parties' lawyers ask for in their arguments
19 is no criterion or measure of damages sustained. The opinion
20 or conclusion of the parties' lawyers as to what damages should
21 be awarded should not influence you unless it is sustained by
22 the evidence. Examine the evidence carefully and dispassion-
23 ately and determine your answers from the evidence in the case.

13:58 24 Any damages you award must have a reasonable basis in the
25 evidence. They need not be mathematically exact, but there

1 must be enough evidence for you to make a reasonable estimate
2 of damages without speculation or guesswork.

13:58 3 Nothing should be added to or subtracted from your answers
4 to the damages questions because of sympathy, resentment, nor
5 should you make any deductions because of a doubt in your mind
6 as to the liability of any party.

13:59 7 The fact that I have instructed you on the matter of
8 damages should not be considered as suggesting any view of the
9 Court as to which party is entitled to your verdict in this
10 case. Instructions on damages have been given solely for your
11 guidance.

13:59 12 Your duty is to answer the questions in the special verdict
13 form which, according to the evidence and my instructions, you
14 are required to answer in order to arrive at a completed
15 verdict. It then becomes my duty to direct judgment according
16 to law and according to the facts as you have found them.

14:00 17 You are to answer the questions in the special verdict form
18 solely upon the evidence received in this trial. You are to be
19 guided by my instructions and your own sound judgment in
20 considering the evidence in the case and in answering each
21 question.

14:00 22 You must not concern yourselves about whether your answers
23 will be favorable to one party or to the other, nor with what
24 the final result of the lawsuit may be.

14:00 25 Your verdict must represent the considered judgment of each

1 juror. In order to return a verdict, it is necessary that each
2 juror agree. Your verdict as to each question you are required
3 to answer in order to arrive at a completed verdict must be
4 unanimous.

14:01

5 You should make every reasonable effort to reach a verdict.
6 In doing so, you should consult with one another, express your
7 own views, and listen to the opinions of your fellow jurors.
8 Discuss your differences with an open mind. Do not hesitate to
9 reexamine your own views and change your opinion if you come to
10 believe it is wrong. But you should not surrender your honest
11 beliefs about the weight or effect of evidence solely because
12 of the opinions of your fellow jurors or for the purpose of
13 returning a unanimous verdict.

14:01

14 Each of you should give fair and equal consideration to all
15 of the evidence and deliberate with the goal of reaching an
16 agreement which is consistent with the individual judgment of
17 each juror.

14:02

18 You are impartial judges of the facts. Your sole interest
19 of is to determine whether the parties prove their respective
20 cases by the greater weight of the credible evidence, to a
21 reasonable certainty.

14:02

22 Members of the jury, that concludes the Court's
23 instructions on the law applicable to this case. We're going
24 to now turn to the next phase of the case in which counsel are
25 afforded a second opportunity to address you. Following that

1 phase, the Court will have a few concluding instructions which
2 appear in your binder, after which the case will be formally
3 submitted to you for your deliberations.

14:03

4 So with those comments, we will now turn to the next phase
5 in the case, and I will first call upon Mr. DeSouza for his
6 opening argument. As I explained yesterday, since the
7 plaintiff has the burden of proof, Mr. DeSouza will have an
8 opportunity to address you in both an opening argument and a
9 final rebuttal, that is, rebuttal to any arguments that Mr.
10 Steinle makes on behalf of the defendants.

14:03

11 Mr. DeSouza, you may proceed.

14:03

12 MR. DeSOUZA: Thank you, your Honor.

14:03

13 We you just heard the Court give you the instructions and
14 read the verdict form as to what you will be deciding in this
15 case. But to summarize it and make it very brief, you are to
16 decide today whether the defendant Nofal, LLC doing business as
17 Food Town infringed a photograph, meaning did it use the photo
18 without permission. And if it did, what damages are to be
19 assessed against it? With the other question of: Is Mr. Jaber
20 vicariously liable for that?

14:04

21 But before I get into the evidence that you've heard, I'd
22 like to discuss briefly what this case is not about. And I
23 think it's important to know what's not at issue here before
24 you decide what actually is at issue. And I think Mr. Steinle
25 did a good job yesterday trying to bring up all the different

1 things that are not at issue in this case.

14:04

2 So what is not at issue? What's not at issue is this idea
3 that we heard a lot of testimony about yesterday as to a
4 pre-suit letter that went to the defendant Food Town Mart. Did
5 they get it? Did they not get it? What was the reason for
6 them getting it? What was the reason for them not getting it?
7 You have just heard all the instructions for an hour, and
8 you've seen the verdict form. You have it there in front you
9 -- at least the instructions you have in front of you. I'm not
10 sure if you have the verdict form or not.

14:05

11 Nothing in the instructions, nor in the law, nor in the
12 verdict form says anything about: Did the plaintiff provide a
13 pre-suit notice to the defendant? Yea or nay. You will not be
14 asked that question because it is not part of the law. It does
15 not change whether the defendant Food Town Mart used the photo
16 without permission or not.

14:05

17 Now, that said, although that is not an issue in the case,
18 you heard the instructions that you are to make reasonable
19 inferences based on the evidence that you did hear. And the
20 evidence that you did hear was Ms. Jones testified this letter
21 was sent; and within two weeks thereof, the photograph -- and
22 only the photograph -- came down off of this website that had
23 some hundred to 150 different photographs on it.

14:06

24 You heard the testimony from Amjad Hamed, the son of Mr.
25 Jaber, who was in control of the Facebook page. And he said,

1 "We don't take anything down. It's not like when a sale is
2 over, we take it down, and that's it. We never take anything
3 down and leave all the photographs up. And only myself, Amjad
4 Hamed, and my brother, Nofal Hamed, are in charge of the
5 Facebook account. No one else has access to it, no one else is
6 in control of it."

14:06

7 Yet two weeks after this letter, which Mr. Jaber says he
8 never received, it came down. Now, certainly it could be a
9 remarkable coincidence that the photograph and only the
10 photograph disappeared and every other photograph for the last
11 five years has remained on this Facebook page. But I think the
12 reasonable inference that the jury can make is that they did
13 receive that letter. They knew about the allegation of
14 infringement, and they took the photo down. If the photo
15 stayed up, we'd be having a different conversation. But they
16 did take the photo down.

14:07

17 But as I said before, it's not what you're asked to decide
18 today. Whether they got the letter or not, when the photo came
19 down or not, is not one of the six questions that you will be
20 answering.

14:07

21 Now, Mr. Steinle yesterday, also, was very animated when he
22 got into a declaration that Ms. Jones submitted in this case,
23 that none of you have had the benefit of seeing, it was never
24 displayed to you, the purpose of that declaration was never
25 discussed with you. And Mr. Steinle went through, well, you

1 said there's six photographs, and there's only one. Or you
2 said you discovered this in 2022, and this was really in 2021.
3 Ms. Jones said, "It was an error, I'm sorry, I made a mistake."

14:08

4 At the end of the day, that is not what you are here to
5 decide. And I think the reason why so much time was spent on
6 both of these things yesterday is because when you actually
7 look at what you are to decide, there's not a whole lot for the
8 defendants to argue with, so they would rather argue about the
9 nonissues in the case than the actual issues in the case.

14:08

10 Now, what are you deciding? Well, we saw the instructions.
11 What you are deciding, first and foremost, is did Nofal, LLC
12 doing business as Food Town Mart infringe on Prepared Food
13 Photos' copyrighted work? There were multiple subparts to
14 that. Is Prepared Food Photos the owner of a photograph? Is
15 it subject to a valid copyright? Both of those have already
16 been decided. The defendants have stipulated absolutely, yes.
17 So the only question is: Did the defendant copy protected
18 expression in the work?

14:09

19 We know it didn't have permission. That was clear. Ms.
20 Jones testified to it. Mr. Jaber testified to it. There was
21 no permission. Did they copy protected expression? Well, they
22 copied the entirety of the photograph. This is not a question
23 of did they copy some small portion, did they create some type
24 of ad that only used something that didn't use the whole
25 photograph. They used every single bit of the photograph. So

14:09

1 the answer to that question is going to be resoundingly yes.

2 Now, what I find somewhat distressing is that the answer to
3 that question is an obvious yes; yet Mr. Jaber was sued and
4 Nofal was sued in February of 2023. They got a complaint that
5 said: Your Facebook page, you were using this, you're
6 responsible for this. Right off the bat, they denied it. It's
7 not our Facebook page, we didn't do it, it's not us. They had
8 an opportunity later in the case come August of 2023, some six
9 months later, asked them a series of written questions:
10 Identify all of your social media pages. We don't have any.
11 We don't have any. Did you use the photograph? No. We never
12 used the photograph.

14:10

13 Until yesterday, the very first time going back to February
14 of 2023, it took until yesterday for Mr. Jaber to get on the
15 witness stand and under oath look at each and every one of you
16 and say: You're right, it is our Facebook page. We did use
17 it. I don't know that I heard "sorry," but he finally
18 acknowledged: It is our Facebook page, we did use it.

14:10

19 But I think in the instructions you'll see there is
20 instruction about discrepancies and witness testimony. Mr.
21 Jaber testified yesterday: I got sued in February, 2023. I
22 received a copy of the complaint. And upon my receipt of the
23 complaint, I spoke to my children, Nofal and Amjad, and they
24 told me, yes, dad, it's our Facebook page. And I realized at
25 that time it's our Facebook page.

14:11 1 Yet for some reason, in August, 2023, deny, deny, deny,
2 responses to written questions, not our Facebook page, not us.
3 Mr. Jaber had a deposition in September, 2023, swore to tell
4 the same truth that he swore to tell yesterday, took the same
5 oath, and said don't have a Facebook page, not our page, we
6 didn't do this, I have no idea who could be behind this.

14:11 7 When I asked him in his deposition, tell me the names of
8 all of your employees so we can figure out where this Facebook
9 page is coming from, he conveniently left off the two employees
10 that were in charge of this Facebook page. He told me the
11 butcher's name. He told me the cashier's names. He told me
12 every person in the store except for Amjad and Nofal. And so
13 your job is to assess credibility, conduct of the parties.

14:12 14 What do you believe he knew and when he knew it? But at
15 the end of the day, that still doesn't affect the question:
16 Did they use the photograph without my client's permission?
17 And it's undoubtedly yes, because he admitted it, his son Amjad
18 admitted it yesterday. Amjad admitted it in his deposition.

14:12 19 Now, it's curious with Amjad -- and you heard this
20 yesterday, especially on this idea of when Mr. Jaber knew about
21 something -- Amjad testified a year ago under oath, you know,
22 in December, a little less than a year ago at this point,
23 testified how did you find out that 2.29 a pound for this, you
24 know, what was the process for that? And he said, "Well,
25 either my dad or the butcher had to tell me. I don't know

1 which one, it was one of the two of them."

14:13

2 And I asked him right then and thereafter, "Did the butcher
3 know about the Facebook page?" He said, "Yes." I then asked,
4 "Did your father know about the Facebook page?" And he said,
5 "Yes." Now, he tried to change that testimony yesterday. He
6 walked it back. We showed him his deposition testimony, and he
7 confirmed, yeah, that's what I said a year ago. Again, you can
8 make the credibility determinations, but what all of those
9 facts, regardless of credibility show you, is that they
10 unequivocally used the photo. And they unequivocally did not
11 have permission to use it.

14:14

12 Now, the next thing that you will answer on the verdict
13 form once you get past Question 1 is: Is this fair use? And I
14 asked Mr. Jaber a series of questions yesterday, which you
15 probably know why I asked him today. Was this for parody? Was
16 it for education? Are you a for-profit business or nonprofit?
17 Was this for teaching, scholastic? He said for profit; no, not
18 teaching; no, not parody; no, not criticism; no, not education.
19 This is unequivocally -- and everyone in the jury has eyes --
20 you used a photograph that is meant to sell products, grocery
21 products, to sell grocery products. You used it for the exact
22 purpose that this photograph was intended, the only difference
23 being you didn't pay for it. You used it to advertise a sale
24 in your store. And as Mr. Hamed said, to draw customers into
25 the store so that they would buy things.

14:15 1 So when you are looking at fair use and its factors, I
2 think unequivocally there is no dispute or debate whether this
3 was fair use. But the interesting thing you should ask
4 yourself when you look at the fair use defense is consider the
5 defense itself and what the defendants have -- the positions
6 they have taken in this case.

14:15 7 On the one hand, they have said in their answer to the
8 complaint, "Not our Facebook page, we've never had a Facebook
9 page, we've never used a paragraph." On this hand, they have a
10 defense that says, "Well, yeah, I mean, we used it, but it was
11 fair." They are making inconsistent positions in this case
12 throughout the entirety of the case. It was only yesterday
13 that they finally owned up, "Yeah, we did use it." But going
14 back to February of 2023, they have said, "Never used it; but
15 if we did, it's fair use." I think you need to consider that
16 and, again, make credibility determinations.

14:16 17 The third question deals with Mr. Jaber's vicarious
18 liability. You saw there's a whole list of things. Did Nofal
19 infringe? Yes, it did. Did Mr. Jaber have the right and
20 ability to control, and did he fail to take any action, and did
21 he profit from the infringement? The answer to all of that is
22 yes.

14:16 23 He testified: I am the sole person in control of this
24 company. Every single person reports to me. There are no
25 other owners. I am the sole, ultimate manager of this store.

1 I'm Amjad's boss, I'm Nofal's boss, the butcher's boss.

2 Everyone in the store, I am their boss.

14:16

3 Vicarious liability does not depend on knowledge. Even if
4 you find that he was somehow not knowledgeable or didn't know
5 about the Facebook page, it's right and ability to control. He
6 certainly had the right and ability to control what Nofal, LLC
7 was doing.

14:17

8 Did he profit from the infringement? Of course he did.
9 You heard the testimony. They sell pork chops every week in
10 that store. They advertise pork chops to bring people into the
11 store to buy things, whether it's spare ribs, pork chops, or
12 chicken wings. Every dollar this store makes, the profit goes
13 to him.

14:17

14 Not only that, but they profited in the form of, you heard
15 the testimony, we have never paid for a single photograph that
16 we've ever used to advertise anything, whether on our Facebook
17 page or otherwise. They saved whatever money they saved with
18 respect to using my client's photos and whoever else's photos
19 they decided to use. So all of the elements from vicarious
20 liability are there as well.

14:18

21 Now, when you look at the verdict form, it goes straight
22 into damages. And the last question is willfulness, but I
23 think you need to address willfulness before you address
24 anything else. Willfulness can mean two things. It can mean
25 intentional. It can mean someone purposefully went out there

1 looking to infringe, and that's why they did it.

14:18

2 But it also means reckless disregard for a copyright
3 owner's rights in the work. And you have that in the
4 instructions. Was this reckless disregard? Well, you all saw
5 the demonstration yesterday. Mr. Steinle and Mr. Hamed set up
6 on the screen the exact search that he did, and it's the same
7 way that he found all the photographs that he's ever found.
8 And the way he found it was he Googled "fresh pork chops," not
9 "free photos of pork chops," just "fresh pork chops." And it
10 came up with a laundry list of the photographs. He happened to
11 like our client's photograph, and that's the one he used.

14:19

12 But I think every member of the jury saw that every one of
13 those photographs, whether it was our client's photo or some
14 other person's photo, directly underneath the photo had the
15 website that the photo was on. And clear as day, before he
16 ever pushed the button and held it to download, it said,
17 "Prepared Food Photos."

14:19

18 At that point, Mr. Hamed could have clicked on the photo,
19 as he could have done on any of the photographs on Google. And
20 when I had him do that, just click, one mouse click whatsoever,
21 one thumb click whatsoever, clear as day Google tells you for
22 just about every photograph that's on their site, "Image may be
23 protected by copyright. Click here to read more."

14:19

24 Or he could have clicked the blue link that said, "Visit
25 site," which would have taken you directly to Prepared Food

1 Photos website which would have invited them to subscribe and
2 become subscribers of our service or my client's service. He
3 didn't do that.

14:20

4 But what's more is that he testified -- and I asked him --
5 well, what if you had done that? What if you had clicked and
6 saw, "Images may be subject to copyright," would you still have
7 downloaded the photograph anyway? And he said, "Well, you
8 know, maybe. I don't know. Possibly, I don't know."

14:20

9 So is it reckless to go online and just assume that I can
10 do a Google search and copy photos from anywhere, any website,
11 regardless of whether they're from Getty, iStock, Shutterstock,
12 any different type of service that's similar to what Prepared
13 Food offers. I say the answer is yes. But you have to make
14 that determination. And the reason it's important that you
15 make that determination before we go to the damages analysis is
16 it matters.

14:20

17 As the Court read to you, there are two types of damages
18 under the Copyright Act. There are actual damages, and there
19 are statutory damages. If you start with statutory damages,
20 statutory damages say you must give a number between \$750 and
21 \$30,000 if it's not willful. You can increase it -- you don't
22 have to, but you can increase it up to \$150,000 if you find it
23 to be willful. You can decrease it -- again, you don't have to
24 -- down to \$200 if you find it to be innocent. The discretion
25 is yours when it comes to statutory damages. If you find it to

1 be willful, but you say \$20,000 is the number, that's your
2 right. If you find it to be willful and say 100,000 is the
3 number, that's your right.

14:21

4 But if you don't find it to be willful, you are somewhere
5 between the 750 and \$30,000. Now, the Court also instructed
6 you as to what innocent means. "Innocent" means didn't know
7 and had absolutely no way of knowing. The notion that they had
8 no way of discovering that Prepared Food Photos opened this --
9 Prepared Food Photos owned this photo when he downloaded and
10 showed you himself downloading it directly off of my client's
11 website when all he had to do was click a button was not
12 innocent. The defendants have not presented any evidence that
13 someone told him they could do this, that it's okay to do this,
14 that they followed some website that said click here to
15 download free photos. There's nothing innocent about what they
16 did. At best, it was reckless which, as the instructions say,
17 is willful.

14:22

18 Now, you will have to award an amount of damages. And
19 there's two -- there's two pieces to it. There's the actual
20 damage, and there's the statutory damages. And they're
21 separate numbers. They're not the same thing. My client
22 doesn't get both of them. You will have to come up with a
23 number for one and the other, and my client will elect which
24 one it prefers at the end of this case, after you are done
25 doing that.

14:23

1 But let's talk about actual damages. Actual damages, as
2 you have in your instructions, can mean a variety of things.
3 It can mean, for one, the profits that the plaintiff would have
4 made but for the infringement; or, B, the price that a willing
5 buyer was willing to pay to the plaintiff to license that work
6 and/or others.

14:23

7 Now, it is important that you keep in mind the Court's
8 instruction that evidence is -- you're limited to the evidence
9 that has been presented to you. That is what you are to
10 consider. And the only evidence on damages that has been
11 presented to you is Ms. Jones' testimony with respect to the
12 subscription rate that my client charges, the fact that there
13 are no shortage of willing buyers that pay that subscription
14 rate, the fact that Ms. Jones said if you use one photograph or
15 10,000 of our photographs, you pay the same \$999 at minimum a
16 month rate for use of the photo, and you must do this in one-
17 year increments.

14:24

18 And she testified who their subscribers are, why it's
19 important that they have that subscription plan, and
20 unequivocally testified based on the length of time that was
21 used here from September 28th, 2020 until at least sometime in
22 November, 2021 the actual damages, meaning the lost
23 subscription fee, is \$23,976, which is the equivalent of two
24 years of license at the 999 a month. That is the only number
25 on damages that the jury has heard.

14:24

1 The jury has not heard evidence: But this photograph is
2 really worth this or, no, this is what buyers would actually
3 pay. None of that evidence came out. The only evidence was
4 Mrs. -- Ms. Jones' testimony. Now, Mr. Steinle tried yesterday
5 to do a math equation with Ms. Jones. He said, well, what is
6 11,988 -- that's the 999 times 12 -- what's the annual amount
7 divided by 18,000 photos? It's really just a couple of
8 pennies; right?

14:25

9 Math is what it is. Never been very good at it myself.
10 I'm assuming that's the right number. But it doesn't matter
11 because it wasn't evidence. I could ask Ms. Jones to divide a
12 hundred by two. It's meaningless when it comes to what are the
13 actual damages here, because she testified: We don't license
14 individual photographs. We only do the entire library, and
15 there's good reasons for that. And she explained those
16 reasons.

14:25

17 So when you are filling in the box what is the plaintiff's
18 actual damages, we would ask that you put in \$23,976, which is
19 999 a month times 24 months. It's the two years that they
20 should have paid if they had done this the right way and
21 licensed the work in the proper manner.

14:26

22 Now, when you get to statutory damages, as I said, it's
23 going to matter whether you find this to be willful or not.
24 But there are a variety of factors you can consider. One of
25 those factors is essentially the actual damages. What is the

1 amount of money the plaintiff actually lost here? That's
2 23,976. There are various factors for you to consider. But to
3 me -- and none of them are more important than the other -- but
4 to me, I want you to focus on deterrence. Deterrence of not
5 just Food Town Mart but other infringers that are out there in
6 the market looking to do something similar, engage in similar
7 activities.

14:27 8 MR. STEINLE: Well, I'm going to object at this point,
9 your Honor. Nowhere in the instructions does any reference
10 made to deterrence at all, and I would object to this argument.

14:27 11 MR. DeSOUZA: It's on Page 17, your Honor, deterrence
12 of future infringement, and the law is --

14:27 13 THE COURT: Yeah. What the jury is sufficiently
14 instructed on are the matters that are germane to the evidence
15 in the case, and it will be up to the jury to draw from the
16 evidence that has been presented what the facts are, and their
17 verdict will hopefully speak accordingly.

14:27 18 MR. DeSOUZA: What I want the jury to --

14:27 19 JUROR NO. 5: Excuse me, your Honor. I apologize. I
20 need to take a break --

14:28 21 THE COURT: Sure.

14:28 22 JUROR NO. 5: -- for just a few minutes.

14:28 23 THE COURT: We'll take a recess for 15 minutes.

14:28 24 COURT SECURITY OFFICER: All rise.

14:28 25 (The jury left the courtroom.)

14:28 1 (A short recess was taken.)

14:28 2 COURT SECURITY OFFICER: All rise.

14:28 3 (The jury entered the courtroom.)

14:45 4 (The court is called to order.)

14:45 5 THE COURT: Mr. DeSouza, you may continue.

14:45 6 MR. DeSOUZA: Thank you, your Honor.

14:46 7 I think where I left off was dealing with statutory
8 damages. And there are a number of factors for you to consider
9 with statutory damages. One of them is the revenue lost by the
10 plaintiff. To us, that's the 23,976. That's their actual
11 damages. But there's also the circumstances of the
12 infringement and deterrence. And at least there, what you
13 heard in this case was that the standard process for how this
14 defendant operates is not to pay for images or other
15 intellectual property that it uses in its advertisements on its
16 Facebook page or otherwise. Standard practice is find a photo
17 I like, scroll to it, download it, never even bother looking at
18 the website, and that's not allowed. It simply is not. That's
19 not how the law works.

14:46 20 And in addition, as we've already covered, we have this
21 credibility problem of Mr. Jaber for well over a year, I guess
22 18 months, 20 months at this point, of saying, nope, not my
23 page, didn't do it, not me, deny, deny, deny, only to show up
24 at trial yesterday and say, well, you know what, it is our
25 Facebook page.

14:47

1 The amount of effort that has gone in to get to where we
2 are today, to have Mr. Jaber show up on the day of trial and
3 finally say, yeah, you got me, it's my Facebook page, I think
4 justifies what Ms. Jones was talking about yesterday, which is
5 -- and the example she used, and I think it's a good one -- is
6 23,976. You know, that's the actual damages. If you had come
7 to us and you had said, I want to license your library, that's
8 what you would have paid.

14:48

9 Statutory damages exist generally where actual damages are
10 somewhat difficult to calculate but, also, as a means -- I
11 don't want to say to punish the offender, but at the end of the
12 day, as Ms. Jones said, if you go into a grocery store, if you
13 go into Macy's, if you go into any store and you see an item on
14 the shelf that you like and it's a \$100 for that item, you say,
15 well, I don't want to pay 100, I think I'll just take it for
16 free, and you get caught walking out the door, your get out of
17 jail free card is not to produce \$100 and say, well, you caught
18 me, I guess I'll just pay what I should have paid in the first
19 place, and you're done with it.

14:48

20 An infringer, as Ms. Jones said, at least in her opinion,
21 should pay more than what the licensed value was, whether the
22 license value was \$100 or in this case \$23,976. And so you
23 will -- as I said, this is your discretion. Statutory damages
24 is a very discretionary number. You, as members of the jury,
25 will have to decide this number. I can tell you what Ms. Jones

1 wants you to put, but that's just one person's opinion. I'm
2 sure Mr. Steinle has another opinion as to what number you
3 should put down.

14:49

4 In Ms. Jones' opinion if you believe this is not willful,
5 then the statutory damages maximum is \$30,000. And we believe
6 it's appropriate that you would award the full maximum \$30,000
7 versus the 23,976 of the actual damages. If you do find it to
8 be willful, you have the discretion, not the obligation, to
9 increase that amount above 30,000 all the way up to 150,000.
10 And you will make a determination as to what number you believe
11 to be appropriate.

14:49

12 Obviously from a plaintiff who has filed this lawsuit,
13 Ms. Jones and Prepared Food Photos would love nothing more than
14 for you to make that number as high on the scale as possible to
15 send a strong message to infringers such as Mr. Jaber and Nofal
16 and others out there that you can't just do this, nor can you
17 continue doing this. But it will be your discretion. Thank
18 you.

14:50

19 THE COURT: Thank you, Mr. DeSouza.

14:50

20 Mr. Steinle.

14:50

21 MR. STEINLE: Thank you, your Honor. Excuse me.

14:50

22 Good afternoon, gentlemen. I'd like to begin by again
23 thanking you for your time and your service throughout the last
24 two days. It's very, very significant, not only to my client
25 but to the system that you spent the time in sitting on this

1 particular very important case for my client. And as you can
2 see from counsel's argument, it is a very significant case.

14:51

3 I'm going to begin by in addition thanking you, trying to
4 remind you of something. The plaintiff has the burden of
5 proof. The plaintiff has to prove to you these things that are
6 on the special verdict. And they have to prove it to you by a
7 preponderance of the evidence.

14:51

8 Now, what was kind of covered or not covered was the fact
9 that what I'm asking you to do is to consider all of the
10 evidence that you've heard over the course yesterday, because
11 all of the evidence is relevant and it's important. They
12 somehow have completely blown off the testimony about the
13 declaration of Ms. Jones. Well, that doesn't mean anything,
14 she was just mistaken, she was just mistaken. But yet they
15 spend time and time and time again attacking Mr. Jaber because
16 of his inconsistencies. So in essence, well, we can be
17 inconsistent, even though we're the plaintiff and even though
18 we brought this lawsuit, but Mr. Jaber.

14:52

19 And the other thing, gentlemen, is this, is that Mr. Jaber
20 has a right to defend himself against these claims being made
21 in this lawsuit. So I think all of this information is
22 relevant and important. And I do want to cover a few things.

14:52

23 First of all, there is no question. I'm the one that put
24 Amjad on the stand and showed to you how he downloaded this
25 picture and lady -- years of doing this, too many ladies on the

1 jury -- but, gentlemen, the reason that, in addition to other
2 reasons, is that I wanted Amjad to testify as to how he located
3 this photograph. And there are insinuations from counsel that
4 there are other photographs on that website that don't belong
5 there, and there is not one drop of testimony that there's
6 another photograph on that website or on that Facebook page
7 that doesn't belong there or that is there improperly.

14:53

8 What we're talking about is we're talking about in this
9 courtroom today we're talking about one photograph of one pork
10 chop that was used on a Facebook page, period, end of story.

14:54

11 And what Mr. Amjad -- or what Mr. Hamed did was Mr. Hamed
12 showed you how he obtained the photograph on the big screen.
13 He didn't go -- he went to Google Images. He saw an image. He
14 put his thumb on it, and it downloaded into his library. And
15 when it downloaded into his library, his photo library, you saw
16 the photograph. There were no restrictions on that photograph
17 that he downloaded. There were no watermarks on that
18 photograph that he downloaded.

14:54

19 So when you look at the entirety of the case, the entirety
20 of the case is the methodology that he utilized, not -- not --
21 you don't have to decide what he could have done. What you
22 have to decide is what he did do in this particular case, and
23 was it reasonable? That's what you're going to have to decide.

14:55

24 Now, when we talk about the case, when I said look at the
25 evidence in its entirety, this case was brought by Prepared

1 Foods. This is the nature of their business. And what
2 Prepared Foods does is they send an infringement letter and
3 they send an infringement letter to not Sharif Jaber, but to
4 his brother Frank. And they send it at the wrong address in
5 November of 2021.

14:55

6 There is -- and there's an insinuation that that photograph
7 -- or that that letter, rather, was somehow received by my
8 client Sharif Jaber. There -- there is -- you have to look at
9 the evidence that's on the record. And the evidence that's on
10 the record is that the only thing that we have is the letter
11 itself. That's it. Addressed to a different party, addressed
12 to a different address, indicating the violation.

14:56

13 And then again this professional organization, this
14 professional organization goes and files a lawsuit against Mr.
15 Jaber, Frank Jaber, Villard Foods, Villard Food Town, they --
16 they don't do anything except bring a lawsuit against the wrong
17 people. And then what happens is a year almost passes before
18 they bring a lawsuit against my client Sharif Jaber and Nofal,
19 LLC. The reason that that's important, ladies and gentlemen,
20 is, again, these are professionals that deal with this every
21 day. And this is what happens?

14:57

22 Now, after the lawsuit is filed, Ms. Jones does a
23 declaration. And the reason that I made such a big deal about
24 it is it does directly affect her credibility. I counted
25 numerous times, and I just want to address a few of them, what

1 this -- and this is -- a declaration is a sworn statement under
2 oath. This is the woman that testified in this courtroom.
3 This is a woman that was involved in commencing this lawsuit.
4 This was a woman that indicated that she's the one that sent
5 the infringement letter. And in that declaration, countless
6 times what she says is, "I sent the infringement letter,"
7 that's what the declaration says, "I sent the infringement
8 letter." She says that "I talked to the principal and talked
9 about negotiations and settlement," "I received numerous
10 e-mails from the principal," and then she continues to state
11 that there was some discussion about resolution of this case.

14:58

12 That's significant because -- and they just say, well, she
13 was mistaken. We're talking about a lawsuit in federal court,
14 and she's just mistaken, and that's acceptable? That's not
15 acceptable, ladies and gentlemen. That's not acceptable at
16 all. And that does directly affect her credibility.

14:59

17 So in -- in this particular lawsuit, ladies and gentlemen,
18 what has happened is you heard the testimony of Amjad, and what
19 Amjad said -- we're going back to the actual infringement --
20 what Amjad said is: I did it. I created this Facebook page.
21 And he said: My father didn't know. I never told him.
22 There's no way that my client Sharif Jaber knew.

14:59

23 But the other thing that I want to comment about is this is
24 not some great big food chain with delineation of job titles
25 and job duties and job responsibilities. This is a family-run

1 business with six employees, and they all do their own jobs.
2 And what -- what Amjad said is: I thought that it would help.
3 That's what he said. I thought that it would help, I didn't
4 tell my dad what I was doing, I didn't indicate to him anything
5 about what I was doing.

15:00

6 So when you are evaluating this case, evaluate the entirety
7 of the evidence that you heard, because as I go through some
8 other things, the entirety of the evidence, the nature of the
9 violation, the scope of the violation, all of those factors are
10 indeed relevant. It's just not that simple, that there's a
11 violation, therefore, we want \$150,000. It's not that simple.
12 You have to look at the entirety of the case.

15:01

13 So when we go through this special verdict that we have
14 heard about and that counsel has talked to you about, the first
15 question that you're going to have to address is: Did Nofal
16 infringe upon the copyrighted material? There is no dispute.
17 There is no dispute that he created the material. There is no
18 dispute that it was copyrighted. We stipulated to that.

15:01

19 But the question then also asks you to decide whether or
20 not they infringed. And what I mean by that is: It is
21 important -- it is important to understand this URL is Villard
22 Food Town. It's not Nofal, LLC. It's Villard Food Town.
23 That's the actual URL. So it's going to be you who have to
24 decide whether or not this of use of this one photograph, this
25 one pork chop photograph was to Nofal, LLC's credit -- or to

1 their benefit, excuse me.

15:02 2 You're also going to have to ask or address the question of
3 fair use. And it -- and it doesn't end, as counsel had
4 suggested, at whether it's this -- this -- there are four
5 factors you're going to see that you have to address. And
6 those four factors include, they include this, when you're
7 deciding fair use: How creative was the work? Did the use of
8 a -- was the use a small use of the copyright? Does the use of
9 the photograph go to the heart of the work? And how much harm
10 did the -- how much harm did it cause to the existing market
11 value of the existing work?

15:03 12 So it doesn't end. You have to also address these when
13 you're going to decide the question of whether or not fair use
14 applies to Nofal. And in this particular case, when you're
15 talking about the creative work, we're talking about a
16 photograph. We're talking about one photograph that's 23 years
17 old at the time of the use. That's how creative the photograph
18 is. It's one 23-year-old photograph.

15:04 19 And did the use include a small use of the copyrighted
20 work? We heard over and over and over again, there's 18 or
21 \$20,000 in this -- or 20,000 images, excuse me, in this
22 library. Did this include a small use of a copyrighted work?
23 I -- the answer is absolutely yes. It's one pork chop
24 photograph out of 20,000.

15:04 25 Does the photograph -- does the use of the photograph

1 go to the heart of the work? You saw him scroll through those
2 -- this doesn't go to the heart of the work. These are
3 numerous photographs of various types of meat products and
4 other products. It doesn't go to the heart.

15:04

5 And, lastly, how does it harm the existing market value of
6 the existing work? There is no evidence -- none, zero -- there
7 is no evidence that this use harmed the existing market value
8 of that library. Ms. Jones didn't testify: We lost customers.
9 Ms. Jones didn't testify: We -- we lost benefit. Ms. Jones
10 didn't testify that there was any harm to the existing market
11 value. All she testified to is subscription, period. That's
12 all she testified to.

15:05

13 So because there is no evidence of any harm to the existing
14 market value, as it relates to the question of fair use, the
15 only answer to that question is: Yes, fair use is applicable.
16 One picture of one pork chop photo on a Facebook page one time.
17 Fair use. Fair use is applicable, and I would ask that you
18 answer that question yes. And I would argue to you you're done
19 at that point. You don't have to answer any other questions,
20 that Mr. Jaber and his boys are entitled to the defense of fair
21 use.

15:06

22 However, I have to address the next questions because if
23 indeed you don't find that fair use is applicable, then we have
24 to address the question of whether or not Mr. Jaber personally
25 is vicariously liable for the actions of his son in this

1 particular case. And one thing that counsel left out when he
2 was talking about vicarious liability is they have to
3 demonstrate. They've alleged vicariously -- that he's
4 vicariously liable. But they have to address the issue of
5 financial benefit.

15:07

6 And what counsel says is: Well, of course, he made a
7 financial benefit. Well, where is the evidence? Where is the
8 evidence not -- not that Nofal benefited, because we're talking
9 about vicarious liability. We're talking about personal
10 liability. And they have to prove that that gentleman
11 personally profited from the use of one photograph on one
12 Facebook page. They have to prove that before you can find by
13 a preponderance of the evidence that he's vicariously liable
14 for the actions of his son. And there is no evidence. They
15 didn't elicit any evidence. I didn't hear any dollar amount
16 that he gained at all by use of that.

15:08

17 So as it relates to the issue of vicarious liability,
18 ladies and gentlemen, I would submit to you that there's only
19 one answer, and the only one answer to that is, no, he's not
20 vicariously liable for this.

15:08

21 The answer of the -- and I will also think that it's
22 important to address the question of willfulness. In this
23 particular case, willfulness, an intentional act, that's what
24 it is. Willfulness is an intentional act. There is absolutely
25 no evidence that -- you were able to assess the credibility of

1 Amjad. There is absolutely no evidence that he intentionally,
2 intentionally, violated the copyright rights of Prepared Food.
3 There is absolutely no evidence at all.

15:09 4 So the next step in the analysis is: Was this with
5 reckless disregard? Reckless disregard is a very high
6 standard. We're not talking about did he negligently do what
7 he did, because that's not reckless disregard. Reck -- excuse
8 me -- reckless disregard is essentially knowing and not caring.

15:09 9 MR. DeSOUZA: Objection. Counsel is informing the
10 jury on the law that is not in the instructions at this point.

15:09 11 THE COURT: Well, the jury understands the Court's
12 instructions, and I have little doubt that they will follow
13 them. So you may continue, Mr. Steinle.

15:09 14 MR. STEINLE: Reckless disregard is a much higher
15 standard than mere negligence or making a mistake. There is no
16 evidence. Again, you saw the demonstration. You heard the
17 testimony. There is no evidence of reckless disregard. There
18 is no evidence of willful conduct. There is no evidence as it
19 relates to that issue.

15:10 20 So when you are addressing that special verdict, the only
21 answer to that question is: There was no willful disregard in
22 this particular case. There was no -- to make a mistake or to
23 make -- or to have a fault is not reckless disregard.

15:10 24 So as we get to the next questions as it relates to the
25 damages, in this particular case, ladies and gentlemen, yes,

1 there is actual damages, and there's statutory damages. You
2 had heard the Court's instructions as it relates to actual
3 damages. And as it relates to the issue of actual damages, the
4 only testimony, the only testimony that you heard was, indeed,
5 the \$23,000 figure. That's the only evidence that you heard.

15:11

6 However, we're not talking about the use -- the unlimited
7 use of a library, the entire library is \$11,900 a year. We're
8 talking about one photograph. We're talking about the use of
9 one photograph on a Facebook page. So I will let you decide
10 what the value of one photograph -- and I -- I didn't mean to
11 be flip about it. But that's 1/20000 of the entire library
12 that he utilized in this particular case.

15:12

13 And did they own it? Yes, they did. But to -- I would
14 submit to you that in this particular case that that figure of
15 \$23,000 for the use of one photograph is -- is the reason that
16 we're here today, for you to decide what's reasonable.

15:12

17 I would submit to you that you didn't hear any evidence
18 about any lost profits from Prepared Food. You didn't hear any
19 evidence about how it affected the library. You didn't hear
20 any evidence about any of those things. So I would submit to
21 you, ladies and gentlemen, that -- lady -- I keep saying that;
22 it's habit, 40 years habit -- but I would submit to you that
23 the -- that you are entitled, if you believe it to be
24 reasonable, that you could insert zero in there. They weren't
25 damaged. They weren't damaged on any level on any respect by

1 the use of this photograph. So as it relates to actual
2 damages, I would ask you to insert a smaller amount in
3 answering that question.

15:13

4 Now statutory damages is, again, something that you're
5 going to have to decide. And, again, when you look at the
6 instruction, the instruction on statutory damages relates to
7 the types of things that we talked about today: What is the
8 violation? How -- how extensive was the violation? How much
9 of the library was used? We're talking about again -- I'm
10 repeating myself a thousand times -- we're talking about one
11 pork chop photo used on one Facebook page.

15:13

12 And the reason that I brought in the information about the
13 Facebook page is because, again, that's important. We're talk
14 -- we're not talking about this being on the internet. We're
15 talking about this being on a social media site, a Facebook
16 page. And we're talking about a Facebook page that has 1,000
17 followers. And the only way that you can get access to the
18 Facebook page is one of two ways, you either have to like Food
19 Mart or you have to search. So what is the exposure of this
20 pork chop? I would argue to you that the exposure is minimal
21 on the overall scheme of things.

15:14

22 So in this particular case, Mr. Jaber is entitled to defend
23 himself against the claims being made. Mr. Jaber is entitled
24 to defend himself against the claims being made in this case.
25 Mr. Jaber is entitled to assert defenses, including fair use.

1 Mr. Jaber is entitled to dispute \$150,000 in damages for a
2 one-use photograph of a pork chop. And for counsel to
3 insinuate otherwise, that he's not entitled to assert those
4 defenses, is somewhat offensive to me. He's entitled to assert
5 those defenses. And to claim, to claim essentially that Mr.
6 Jaber should have just rolled over and paid, should have just
7 done anything. He is entitled to present a defense, and that's
8 what we've done.

15:15

9 Now, the final comment that I'm going to make is this, is
10 we did discuss this, but I feel that it's significantly
11 important. Because Mr. Jaber was -- said he didn't say this,
12 he didn't say that, he didn't say this, he didn't say that.
13 Ms. Jones also took an oath and swore under oath in a
14 declaration certain things that happened. And I'll let you use
15 your own recollection. And certain things that didn't happen.
16 And when she was confronted with it, all she said was, well,
17 I'm mistaken. Excuse me, I'm mistaken.

15:16

18 Well, when we're talking about a federal lawsuit that's
19 brought against my client, I'm mistaken doesn't cut it for me.
20 So in this particular case, ladies and gentlemen, I want you to
21 seriously consider that testimony, too.

15:16

22 I would like to finish by saying this. I thanked you
23 already for your time. If throughout the course of this trial,
24 gentlemen, I have conducted myself in a fashion that you deem
25 to be unacceptable or inappropriate, I would apologize in

1 advance. I take my job very, very seriously. And if I've done
2 anything, please examine the facts of the case, look at the
3 facts of the case in their entirety, and make your decision in
4 this case based upon that. And I thank you very much for your
5 time.

15:17 6 THE COURT: Thank you, Mr. Steinle.

15:17 7 Mr. DeSouza, any final rebuttal?

15:17 8 MR. DeSOUZA: Yes, your Honor.

15:17 9 Is there any way to have the screen on during this, your
10 Honor?

15:18 11 Mr. Steinle just wrapped up by saying Mr. Jaber is
12 entitled to defend himself and not just roll over and pay
13 anything. I agree. Every defendant in every lawsuit is
14 entitled to defend themselves. What they are not entitled to
15 do is lie through the entire lawsuit and wait until trial and
16 say, yeah, you know what, you're right, I was wrong all those
17 other times that I said it's not my Facebook page. It was
18 actually us.

15:18 19 Mr. Jaber had every right to come into this courtroom and
20 say -- back in the beginning of February of 2023 and say, we
21 did it. Here's our defenses. We think it's fair use. Today
22 he tried both. He tried saying we didn't to it and it's fair
23 use. He had every right to say we did it, we don't like the
24 damages, let's focus on the damages, here's how we explain our
25 conduct.

15:19 1 But instead of doing that, he decided to lie. And whether
2 it's a lie or just a simple failure to prepare, he testified
3 over and over and over a year ago: Not my Facebook page, we
4 didn't do it, had nothing to do with it.

15:19 5 And Mr. Steinle comes in here at closing arguments and
6 says, well, hold on. Let's talk about whether this is
7 infringement or not because it said Villard Food Town. I mean,
8 look, the URL says Villard Food Town. It doesn't say Food Town
9 Mart. So, therefore, it's not infringement at all.

15:19 10 I think Mr. Steinle was perhaps not listening to the
11 testimony of his own witnesses, Mr. Hamed who testified, yeah,
12 that's Food Town Mart's Facebook page. Immediately after
13 November, 2021, they changed the name to Food Town Mart. They
14 kept the same URL, but it's Food Town Mart. Mr. Jaber says
15 that's my Food Town Mart Facebook page. Mr. Hamed says that's
16 our Food Town Mart Facebook page. And for Mr. Steinle to stand
17 up at this point and say, gotcha, the URL says Villard Food
18 Town, how do you know that's Food Town Mart, when his own
19 witness said, It's our Facebook page, when their fair use
20 defense assumes we used it and it's our Facebook page, when his
21 own son, his manager, testifies, yeah, it's our Facebook page,
22 I find it to be absurd for him to stand up here and say that.

15:20 23 Now, in my initial opening, I remarked that when you don't
24 have a defense, try to deflect and go other places that you
25 want. So here's what Mr. Steinle did in his closing. He says

1 Mr. Hamed downloaded the photograph. There were no
2 restrictions. There were no watermarks. I agree. Does that
3 change whether he had permission to use the photograph or not?
4 He either did have permission or he didn't. He did not
5 download it -- or at least there's no evidence that he
6 downloaded it from a site that said click here to download free
7 photographs. He went online. He found a photograph. He
8 downloaded it.

15:21

9 The question is whether he had permission to do so or
10 whether he had a license from the plaintiff to do so. Whether
11 he downloaded the photograph, the specific one or the next one
12 or the next one or the next one, it would be the same question.
13 Did he have permission? Not the distraction, well, did it have
14 a watermark? Who cares. The law does not say it has to have a
15 watermark. Did it block him from downloading? Did Mr. Steinle
16 present an ounce of evidence that says there's ways to block
17 people from downloading photographs off of Google Images? Did
18 he march someone in here to say here's how Google Images works
19 and here's how it stops you from downloading? He didn't. Your
20 job is to consider the evidence that's before you. And the
21 evidence that's before you is they didn't have permission.

15:22

22 Mr. Steinle then went on to say, well, you know, the
23 letter, and did they get the letter, did they not get the
24 letter? Consider this, ask yourself this question: Let's
25 assume there was no letter whatsoever. You never saw a demand

1 letter, it was never presented to you, it was nothing sent
2 before this lawsuit was filed. What's the significance? Ask
3 yourself, does that mean they had permission to use the
4 photograph? It doesn't.

15:22

5 The question is: Did they have permission at the time they
6 downloaded the photograph, not whether a letter was sent, not
7 whether they received it. Did they have permission? The
8 answer is still no.

15:22

9 Mr. Steinle then went off and said, well, they sued the
10 wrong party when this thing first started. Okay. My client
11 did sue the wrong party. My client sued Villard Food Town,
12 which is what the Facebook page initially at the time that they
13 downloaded the photograph. They later found out that's not the
14 correct party. The correct party who owns the store is
15 actually Mr. Jaber and Nofal, LLC d/b/a Food Town Mart.

15:23

16 What is the significance of the fact that my client sued
17 Villard Food Town? Does that somehow change whether they had
18 permission to use the photograph or not? I say to you that all
19 of these things that Mr. Steinle brought up are for purposes of
20 distracting you from the actual issue, because the actual issue
21 is very simple. You either had permission to use this
22 photograph, or you didn't have permission to use this
23 photograph.

15:24

24 Now, Mr. Steinle then went on to say, and Mr. Hamed's
25 testimony was Sharif Jaber didn't know. He didn't know about

1 the Facebook page. I asked Mr. Hamed yesterday when he
2 testified my father didn't know, did you testify in your
3 deposition, did your father or the butcher tell you to put it
4 up on Facebook? No. They told me there's a sale. I found the
5 pictures, and I put it up.

15:24

6 Keep in mind, the last post on this Facebook page was July,
7 2022. So if dad or butcher were given instructions about what
8 the price of sales are, it came before July, 2022, not in 2023
9 when he was sued, not when he had his deposition taken, and
10 certainly not yesterday.

15:24

11 Was the butcher aware that you were running the Facebook
12 page? Yes. Why was your dad aware that you were running the
13 Facebook page? Yes. That is how he testified under oath in a
14 deposition a year ago. The fact that he showed up here
15 yesterday after he's had time and opportunity to think about
16 his answers and how they might affect his father's business,
17 decided to say: Oh, no, dad didn't know about the Facebook
18 page.

15:25

19 But, again, I ask you: Think of the significance of all of
20 these pieces of evidence. Whether dad knew about the Facebook
21 page or not is a credibility determination for you to make, but
22 it doesn't affect whether Sharif Jaber had the right and
23 ability to control the infringing activities of his own
24 company. He was the man. All business runs through him. He
25 makes all decisions, all business activity decisions on behalf

1 of this company. Did he have the right and ability to control?
2 Of course, he did.

15:26 3 Now, Mr. Steinle says, well, let's not forget about Ms.
4 Jones. She's got this declaration that, again, none of you
5 have seen that he's chosen to summarize and for whatever reason
6 not put in front of you. And based on his own interpretation
7 today of what it says, well, Ms. Jones made errors, so the fact
8 that Mr. Jaber lied about this being a Facebook page, you know,
9 one hand washes the other.

15:26 10 The errors in Ms. Jones' declaration that Mr. Steinle keeps
11 coming back to are, oh, you know, it says six photographs
12 instead of one. I'm sorry. I discovered it on this date
13 instead of that date. I'm sorry.

15:26 14 Does it affect whether this is their Facebook page? No.
15 Does it affect whether they used it without permission? No.
16 The level of discrepancies in the testimony here for Mr.
17 Steinle to say, well, one person was wrong, so my client's lies
18 are excusable doesn't make any sense. His client decided from
19 Day 1 to deny anything having to do with this, to cover up the
20 fact that his sons did this but not disclosing them in a
21 deposition and waiting 20 months until he got to trial to
22 finally say: Yeah, you know, you're right, it was me. You got
23 me.

15:27 24 So, yes, you can make your credibility determinations.
25 It's what you must do. But think of the caliber and scope of

1 what it is that Mr. Steinle is pointing out versus what it is
2 that we're pointing out in not only his answer, his responses
3 to interrogatories, his responses to requests for admissions,
4 his deposition testimony, that went on and on and on repeating
5 the same lie. And as Mr. Steinle said, he's got a right to
6 defend himself. But nobody has a right to show up in court and
7 lie and lie and lie. That is not putting on a defense. That
8 is misleading. That is mischaracterization. It is anything
9 but a defense.

15:28

10 Mr. Steinle then went on to talk about fair use. And I
11 don't want to belabor the point. You have the instructions as
12 to what fair use is. Mr. Steinle, unfortunately, is mistaken
13 on the law. But you have your instructions, and you can read
14 them. He says, well, this is just one photo out of 20,000,
15 18,000, it's -- it's a small portion of the copyrighted work.
16 He's wrong. The copyrighted work is the photo. As Mr. Steinle
17 keeps coming back and saying, it's one photo, it's one photo,
18 it's one photo. The question that you are to ask yourselves
19 is: What portion of the work at issue in this lawsuit did the
20 defendant use? Didn't use a small portion of that. The
21 defendant used 100 percent of that photo, copied it directly,
22 just downloaded it straight off the website and used it.

15:29

23 Talked about it not being the heart of the work if its one
24 out of 20,000 photos. The work is the photograph. It's not
25 20,000 photographs. It's the photograph.

15:29 1 Mr. Steinle says, well, there's no -- no evidence of
2 harming the market value; right? I mean, I guess he wasn't
3 here when Ms. Jones testified the whole reason they have this
4 subscription model and how they control who their subscribers
5 are is so they can ensure that a grocery store in this market
6 or that market doesn't have a competitor down the street using
7 the same set of photographs. That is the harm, potential harm,
8 to the market.

15:29 9 We then got into damages. And, again, same thing, actual
10 damages, it's 20,000 or it's 12,000 divided by 20,000 images.
11 It ignores the evidence. Mr. Steinle wants that to be
12 evidence. It's his argument. But that's not evidence that you
13 actually received and heard. The only evidence you heard was
14 that our subscribers are free to use one photograph, ten
15 photographs, a hundred photographs, or all 18,000 in the
16 library.

15:30 17 But it doesn't matter how many photographs you use. If
18 you're using any of our photographs, the license price is the
19 \$11,988. The defendants had every opportunity to come before
20 you and say, here's my witness that's going to testify about
21 the value of a single photograph that if you go to this site
22 you could download this photograph of pork chops and it would
23 cost you this amount of money, and have people come in and
24 testify about that. They chose not to.

15:30 25 They didn't bring any evidence with respect to valuation to

1 you in any way, shape, or form. And, thus, the only testimony
2 you have is Ms. Jones' testimony, the Prepared Food website
3 which goes over its pricing structure, and the fact that
4 Ms. Jones testified there is no shortage of willing customers
5 that pay this subscription amount regardless of the amount of
6 photographs they use. There are some subscribers that pay
7 more, but the minimum is the 999 a month, which she says is
8 what this defendant would have had to pay. And if there's any
9 contrary evidence or testimony on that point, I must have
10 missed it, because it was not presented to you.

15:31

11 I think the closing remark from Mr. Steinle in his
12 opposition was that this wasn't even on the internet, it was
13 just on Facebook. I don't even understand the comment.
14 Facebook is the internet. I think everyone here can draw upon
15 their own experiences to understand that Facebook.com is the
16 internet. This photograph went up on the internet. It was
17 used by the defendant to market and sell their meat product.

15:32

18 Mr. Steinle says, well, you know, it was no evidence that
19 there's any other photographs out there that they used without
20 people's permission. Again, Mr. Hamed testified: I do the
21 same thing every single time I need a photograph. If I didn't
22 take the photo myself, I just search the internet, willy nilly,
23 if you will, and if I find a photograph I like, I use it. I
24 don't contact anyone. I don't try to pay for it. I don't try
25 to do anything.

15:32 1 At the end of the day, you make the determination as to
2 what dollar amounts or yeses and nos you put on here. But you
3 are limited to the evidence that is before you. And Mr.
4 Steinle saying let's do a math equation, however right he is on
5 how the math turns out, is not evidence. He didn't testify.
6 He didn't give you anything about value. And, therefore, the
7 only thing you have heard is that my client suffered \$23,976 of
8 actual damages which is the number you should put in response
9 to the Question 4, I believe. And then the discretion turns
10 over to you with Question 5 on statutory damages. Thank you.

15:33 11 THE COURT: Thank you, Mr. DeSouza.

15:33 12 Members of the jury, I'm going to give you the Court's
13 concluding instructions found on Page 21 of your binder.

15:33 14 Members of the jury, this case is ready to be formally
15 submitted to you for your serious deliberation. You will
16 consider the case fairly, honestly, impartially, and in light
17 of reason and common sense. Give each question in the verdict
18 your careful and conscientious consideration. In answering
19 each question, free your minds of all feelings of sympathy,
20 bias, or prejudice.

15:34 21 This case has taken a great deal of time and effort to
22 prepare and try. There is no reason to think that it could be
23 better tried or that another jury is better qualified to decide
24 it. It is important, therefore, that you reach a verdict if
25 you can do so conscientiously.

15:34

1 Nothing said in these instructions and nothing in the
2 verdict form, prepared for your convenience, is meant to
3 suggest or convey in any way or manner any suggestion as to
4 what verdict the Court thinks you should find. What the
5 verdict shall be is your sole and exclusive duty and
6 responsibility. Let your verdicts speak the truth, whatever
7 the truth may be.

15:35

8 If it becomes necessary during your deliberations to
9 communicate with the Court, you may send a note through the
10 bailiff, signed by your foreperson or by one or more members of
11 the jury. No member of the jury should ever attempt to
12 communicate with the Court by any means other than a signed
13 writing, and the Court will never communicate with any member
14 of the jury on any subject touching the merits of the case
15 other than in writing or orally here in open court. If you do
16 communicate with me, you should not indicate in your note what
17 your numerical division is, if any. I will respond either in
18 writing or having you return to the courtroom so that I can
19 respond orally.

15:36

20 You will note from the oath about to be taken by the
21 bailiff that she, too, as well as all other persons, are
22 forbidden to communicate in any way or manner with any member
23 of the jury on any subject touching the merits of the case.

15:36

24 Bear in mind, also, that you are never to reveal to any
25 person -- not even to the Court -- how the jury stands,

1 numerically or otherwise, on the question before you, until
2 after you have reached a unanimous verdict.

15:37 3 Upon retiring to your jury room, your first duty will be to
4 select one of your number as foreperson who will preside over
5 your deliberations, complete the verdict form with the answers
6 you have agreed upon, and serve as your spokesperson here in
7 court. His or her vote, however, is entitled to no greater
8 weight than the vote of any other juror.

15:37 9 During the course of your deliberations, you should assume
10 the attitude of judges of the facts rather than that of
11 partisans or advocates. Your highest contribution to the
12 administration of justice is to ascertain the true facts in
13 this case and return a verdict accordingly. When your
14 deliberations are concluded, and your answers inserted into the
15 verdict form, the foreperson will sign and date the verdict and
16 all of you will return with your verdict here in open court.

15:38 17 Members of jury, that concludes the entirety of the Court's
18 instructions. I would now ask Ms. Vraa to step forward, and
19 Ms. Willenbrink will administer the oath as the bailiff.

15:38 20 (The Court Security Officer is sworn.)

15:38 21 COURT SECURITY OFFICER: I swear.

15:38 22 THE COURT: Thank you.

15:38 23 Members of the jury, you may take your notes and your
24 instruction binder and retire to the jury room. You are now
25 free to deliberate this evening as long as you deem

1 appropriate. If you would prefer to come back tomorrow, the
2 Court is prepared for that event as well.

15:39 3 So we wish you the best. And at the outset, I want to add
4 counsel's comments to reflect those of the Court and that is as
5 a group, you certainly gave this case your undivided attention.
6 It's been a relatively short trial, but I fully expect the
7 verdict that you will reach will reflect the seriousness of
8 your obligation as a juror and your attentiveness, not only to
9 the evidence but the arguments of counsel and the instructions
10 of the Court.

15:39 11 You are now excused to begin your deliberations.

15:40 12 COURT SECURITY OFFICER: All rise for the jury.

15:40 13 (The jury left the courtroom.)

15:40 14 THE COURT: I would ask that counsel provide Ms.
15 Willenbrink a number that you could be reached at beginning at
16 5:00 in the event the jury has a question or we will know
17 certainly by 5:00 as to whether they're prepared to deliberate
18 into the evening or return tomorrow.

15:40 19 The Court stands in recess.

15:40 20 (A recess was taken.)

17:10 21 COURT SECURITY OFFICER: All rise.

17:10 22 (The jury entered the courtroom.)

17:10 23 (The court is called to order.)

17:10 24 THE COURT: Good evening, members of the jury. Mr.

25 ****, Ms. Vraa has informed the Court that the jury has reached

1 a verdict in the case; is that correct?

17:10 2 JUROR NO. 1: That is correct, your Honor.

17:10 3 THE COURT: Thank you. That being the case, I would
4 invite you to tender the envelope with your verdict to Ms.
5 Vraa, and she in turn will pass it up to the Court.

17:11 6 Members of the jury, I am now going to invite Ms.
7 Willenbrink to publish your verdict. As your verdict is read,
8 as to the questions you were required to answer in order to
9 arrive at a completed verdict, I will ask you at the conclusion
10 of the publication of your verdict was this and is this your
11 verdict, so say you one so say you all. So listen attentively
12 as your verdict is read, because at the conclusion of the
13 publication, I will make that inquiry.

17:11 14 Ms. Willenbrink, would you be so kind as to publish the
15 jury's verdict.

17:12 16 THE CLERK: In the United States District Court,
17 Eastern District of Wisconsin, Prepared Food Photos, Inc.,
18 plaintiff, versus Sharif Jaber and Nofal, LLC doing business as
19 Food Town Mart, defendants, Case No. 22-CV-642-JPS, special
20 verdict.

17:12 21 We, the jury, duly impaneled and sworn for our special
22 verdict in the above-entitled action find as follows:

17:12 23 Direct copyright infringement against Nofal, LLC doing
24 business as Food Town Mart. You must answer this question.
25 Question No. 1: (See Part II, Section 1 of the jury

1 instructions.) Did Nofal, LLC doing business as Food Town Mart
2 infringe upon the copyrighted material of Prepared Food Photos?

3 Answer: Yes.

17:12 4 If you answered "yes" to Question No. 1, then you must
5 answer Question No. 2. If you answered "no" to Question No. 1,
6 then do not answer any other questions on this form; instead,
7 proceed to sign and date this form.

17:13 8 Fair use. Question No. 2: (See Part II, Section 2 of the
9 jury instructions.) Did Nofal, LLC doing business as Food Town
10 Mart make fair use of Prepared Food Photos, Inc.'s work?

11 Answer: No.

17:13 12 If you answered "no" to Question No. 2, then you must
13 answer Question No. 3. If you answered "yes" to Question No.
14 2, then do not answer any other questions on this form;
15 instead, proceed to sign and date this form, even if you
16 answered yes to Question No. 1.

17:13 17 Vicarious copyright infringement against Sharif Jaber.
18 Question No. 3: (See Part II, Section 3 of the jury
19 instructions.) Did Sharif Jaber vicariously infringe upon the
20 copyrighted material of Prepared Food Photos? Answer: No.

17:13 21 If you answered "yes" to Question No. 3, then you must
22 answer Question No. 4. If you answered "yes" to Question No. 1
23 but "no" to Question No. 3, then you should still proceed to
24 answer Question No. 4.

17:14 25 Damages. If you answered "yes" to Question No. 1 or "yes"

1 to Question Numbers No. 1 and 3 and you answered "no" to
2 Question No. 2, then and only then answer each of questions
3 numbered four, five, and six.

17:14 4 Question No. 4: (See Part II, Section 4.1 of the jury
5 instructions.) What amount of money fairly and reasonably
6 compensates Prepared Food Photos, Inc. for its actual damages?
7 \$200.

17:14 8 Question No. 5: (See Part II, Section 4.2 of the jury
9 instructions.) What amount of money fairly and reasonably
10 compensates Prepared Food Photos, Inc. for its statutory
11 damages? \$1,000.

17:14 12 Question No. 6: (See Part II, Section 4.2 of the jury
13 instructions.) Was Nofal, LLC doing business as Food Town
14 Mart's infringement of Prepared Food Photos, Inc.'s copyrighted
15 material willful? Answer: No.

17:15 16 Dated at Milwaukee, Wisconsin, this 29th day of October,
17 2024. Foreperson, ***** ****.

17:15 18 THE COURT: Thank you.

17:15 19 Members of the jury, having heard your verdict published,
20 as to each of the questions that you were required to answer in
21 order to arrive at a completed verdict, was this and is your --
22 is this your verdict as to each question, so say you one, so
23 say you all?

17:15 24 JUROR NO. 1: Yes.

17:15 25 (Jurors indicating.)

17:15 1 THE JURORS: Yes.

17:15 2 THE COURT: Thank you.

17:15 3 Mr. DeSouza, do you wish to have the jurors polled?

17:15 4 MR. DeSOUZA: I do not, your Honor.

17:15 5 THE COURT: Thank you.

17:15 6 Mr. Steinle, do you wish to have the jurors polled?

17:15 7 MR. STEINLE: No, sir.

17:15 8 THE COURT: Thank you.

17:15 9 Members of the jury, with the return of your verdict in
10 this case, your work has now come to a close, again with the
11 appreciation of the Court, its staff, counsel, and their
12 respective clients.

17:16 13 As a matter of policy, I generally do not comment on jury
14 verdicts. And when I tell you that, I don't want any of you to
15 take from that thought that somehow or some way the Court
16 disagrees with the verdict that you reached in the case. As I
17 explained at the conclusion of the trial this afternoon, each
18 of you gave this case your undivided attention, and no one can
19 ask for more than undivided attention.

17:17 20 It's a distraction from your everyday life; but as I
21 explained to the panel on Monday, it is indeed at the end of
22 the day a very, very small price that each of us pay in
23 fulfillment of that most important of civic duties. Obviously,
24 our third branch of government is getting an awful lot of
25 attention these days for a whole lot of reasons. But it is the

1 bedrock of the foundation of precisely how wonderful the
2 democracy that we live under has flourished for soon to be 250
3 years. But it takes the shoulder to the wheel by the average
4 citizen to participate in the work of our third branch of
5 government to ensure that this democracy as we know it will
6 continue to flourish.

17:18

7 Momentarily, the Court will have a certificate for each of
8 you that I will present in the jury room. But before we do
9 that, I want to also remind you that we have a rule of the
10 Court that precludes any lawyer or agent on behalf of a lawyer
11 or his or her client from having any contact with you. Now,
12 that rule, of course, does not preclude any juror initiating
13 any contact, including with the Court.

17:18

14 You know, as I explained yesterday, I've been on the bench
15 for 37 and a half years. I've tried over 250 cases. But that
16 said, even Judge Stadtmueller is looking for new and better
17 ways to accommodate our citizens. And if you have some
18 thoughts on the experience that you have come to participate in
19 yesterday and today, I'll be happy to hear from you. I'm not
20 going anywhere. I'll be here tomorrow, next week, next year,
21 and God willing, the year after that. And obviously for
22 someone who is still 82 years old coming to work every day as I
23 did today at 5:30 this morning, it's very telling about how
24 well someone can enjoy his or her work.

17:20

25 So with those thoughts, I'll excuse you momentarily. I

1 know each of you would like to get home and either catch up on
2 what's going on in sports or visiting grandkids. We all have
3 those social outlets to attend to, too.

17:20 4 So thank you one and thank you all for your service.
5 You're excused.

17:20 6 COURT SECURITY OFFICER: All rise.

17:20 7 (The jury left the courtroom.)

17:20 8 THE COURT: You may be seated.

17:20 9 Mr. Steinle and Mr. DeSouza, the jury having heard the
10 evidence in the case, I'm now going to direct the clerk to file
11 the verdict and make it part of the public record in the case.

17:21 12 And I will direct Mr. DeSouza to inform the Court not later
13 than Friday of this week of his client's election with respect
14 to accepting either the actual damages awarded or the statutory
15 damages awarded together with any costs that may be available
16 pursuant to the federal rules and our local rules.

17:21 17 Are there any other matters that we need address this
18 evening?

17:21 19 MR. DeSOUZA: Your Honor, to clarify, you're saying
20 file the bill of costs by this Friday as well?

17:21 21 THE COURT: No, elect -- the bill of costs is handled
22 strictly by the clerk of the court. So there are rules that
23 guide both timing and what is and is not taxable.

17:22 24 MR. DeSOUZA: Understood. I just -- I thought you
25 said costs by this Friday, as well.

17:22 1 THE COURT: No, just an election.

17:22 2 MR. DeSOUZA: Got it.

17:22 3 THE COURT: Anything you'd like to add, Mr. Steinle?

17:22 4 MR. STEINLE: No, sir. Thank you.

17:22 5 THE COURT: Very well. The Court stands adjourned for
6 the day.

17:22 7 COURT SECURITY OFFICER: All rise.

17:22 8 (At 5:22 p.m. the hearing ended.)

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C E R T I F I C A T E

I, JENNIFER L. STAKE, RDR, CRR, an Official
Court Reporter for the United States District Court for the
Eastern District of Wisconsin, do hereby certify that the
foregoing is a true and correct transcript of all the
proceedings had in the above-titled matter as the same are
contained in my original machine shorthand notes on the said
trial or proceeding.

Dated this 3rd day of December, 2024.
Milwaukee, Wisconsin.

Jennifer L. Stake, RDR, CRR
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ELECTRONICALLY SIGNED BY JENNIFER L. STAKE
Official Court Reporter, RDR, CRR
